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THE
BRITISH YEAR BOOK OF INTERNATIONAL LAW
1948

TWENTY-FIFTH YEAR OF ISSUE

Issued under the auspices of the
Royal Institute of International Affairs

GEOFFREY CUMBERLEGE
OXFORD UNIVERSITY PRESS
LONDON NEW YORK TORONTO

Oxford University Press, Amen House, London E.C.4
GLASGOW NEW YORK TORONTO MELBOURNE WELLINGTON
BOMBAY CALCUTTA MADRAS CAPE TOWN
Geoffrey Cumberlege, Publisher to the University

BIBL.
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PRINTED IN GREAT BRITAIN

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THE BINDING FORCE OF A 'RECOMMENDATION' OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS[1]

By F. BLAINE SLOAN, LL.B., LL.M.

Of the Nebraska and New York Bar; Legal Department, United Nations Secretariat

THE General Assembly is established by the Charter as the great deliberative organ of the United Nations. It may discuss and make recommendations concerning any matter which affects the peace of the world or the general welfare of nations. It has been characterized as an international forum, as the 'town meeting of the world'. But the General Assembly was not constituted a world legislature, and its resolutions are not in and of themselves law in the same sense as are enactments of national parliaments. This statement, however, is by no means the equivalent of a negative answer to the question whether a resolution of the General Assembly possesses binding force. The problem of the effect of a General Assembly resolution containing a recommendation to a Member state offers a fertile field for investigation by scholars and experimentation by international statesmen.[2] While the term 'resolution' is applied to all determinations of the General Assembly, the major problem of binding force concerns the obligatory effect of the resolutions containing recommendations to the Member states under Articles 10 to 14 of the Charter.

The experience of the United Nations during its first years has contributed little to the determination of the exact status of a resolution of the General Assembly. The opinions officially expressed vary from the suggestion that certain resolutions are not only legally binding but may be enforced, to the opposite position that no resolution can create either a legal or a moral obligation. Between these extremes may be found numerous statements attributing to a resolution varying degrees of persuasive or moral force, but adding little to the clarification of the problem.

It is not surprising that there has been no satisfactory and universally accepted formulation of the legal effect of a resolution of an international conference. For much the same disagreement exists in certain quarters in regard to the legal status of international law in its traditional and positive forms. There are lawyers who deny that international law can properly be considered more than international morality. While the arguments supporting this denial lack persuasion it is nevertheless true that there is extreme difficulty in defining the juridical consequences of international law in terms familiar to a municipal practitioner who starts with the assumption that there can be no right without an appropriate remedy. In international law it is particularly misleading to confuse the concept of binding obligation with that of enforceability.

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[1] The opinions expressed in this article are those of the author and are not to be identified with those of any organization or group with which he may be associated.

[2] Sayre, 'Legal Problems arising from the United Nations Trusteeship System', in *A.J.* 42 (1948), p. 273, writes: 'Does the affirmative vote of the General Assembly embodying a "recommendation" create a definite obligation, legal or otherwise, and, if so, of exactly what character is the obligation? This is a problem of enormous consequence, as yet unsolved.' See also Kunz, 'The Bogotá Charter of the Organization of American States', in ibid., pp. 575, 588; Fenwick, *International Law* (1948), p. 79; U.N. Docs. A/AC.19/33 (10 February 1948), p. 4; A/C.3/SR. 108 (22 October 1948), p. 8.

Some tests which may be applied in ascertaining the legal character of international law are: Do states act in conformity with the precepts of international law from a sense of obligation? Do legal advisers in foreign offices consider it necessary to advise a certain course as obligatory under international law? Would an international court, if it had competence in a dispute, apply certain rules as binding upon the parties? These tests may be applied and affirmative answers given in regard to international conventions, international custom, and, to a degree, general principles of law recognized by civilized nations. Each of these is recognized as a source of law by Article 38 of the Statute of the International Court of Justice, but resolutions of international conferences and recommendations of the General Assembly receive no express recognition in the Statute and are not even placed in the category of subsidiary means for the determination of rules of law together with judicial decisions and the teachings of the most highly qualified publicists.

Before embarking upon a detailed analysis of the binding effect of a General Assembly recommendation it will be desirable to survey briefly the resolutions adopted by the General Assembly during the first two years in which the United Nations has functioned. Up to 14 May 1948 the General Assembly had convened five times.[1] During that time it adopted 189 resolutions. While a large number of resolutions relate to the administration and internal functioning of the Organization, an even larger number deal with problems affecting the member states. Included in the latter group are resolutions on problems of peace and security, on questions of economic, social, and humanitarian interest, and on international law. The General Assembly has addressed its Resolutions to the Members of the United Nations collectively, to a particular Member or Members, to states, to non-member states, to the Security Council, the Economic and Social Council, and the Trusteeship Council, to committees, commissions, and specialized agencies, to the Secretary-General, the Secretariat, and even to groups of private individuals. In addition there have been declaratory resolutions with no particular addressee. Finally there are resolutions in which the General Assembly performs a specific act, as, for example, the election of members of a council, the establishment of a subsidiary organ, the approval of an agreement, of a report, or of the budget, and the appropriation of funds.

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[1] First Part of First Session, 10 January to 14 February 1946; Second Part of First Session, 23 October to 15 December 1946; First Special Session, 28 April to 15 May 1947; Second Session, 16 September to 29 November 1947; and Second Special Session, 16 April to 14 May 1948.

Resolutions have not been forced into a stereotyped form. On the contrary, the General Assembly has shown considerable ingenuity in its selection of operative words. In resolutions addressed to states it has employed such words as 'recommends', 'requests', 'invites', 'urges', 'calls upon', 'expresses the hope', 'draws the attention of', 'firmly maintains', 'considers', 'takes note of', and 'appeals to'. In resolutions addressed to the Security Council or to its members will be found the following: 'requests', 'recommends', 'calls upon', 'earnestly requests the permanent members', 'expresses its confidence that'. In addressing other Councils, commissions, and committees the General Assembly has also employed similar words as 'recommends', 'requests', 'urges', and 'invites', but in addition it has used 'directs' and 'instructs'. Resolutions addressed to the Secretary-General include the following: 'requests', 'invites', 'recommends', 'considers that it would be desirable', 'authorizes', 'directs', 'instructs', and 'the Secretary-General shall'. Other words used by the General Assembly to accomplish the particular action indicated are 'appropriates', 'adopts', 'refers', 'establishes', 'approves', 'decides', 'appoints', 'elects', 'resolves', and 'welcomes'. Finally, certain formulations of particular interest to which we shall return later in this article may be mentioned, such as, 'declares', 'affirms', 'condemns', 'endorses', 'is of the opinion that', and 'records that . . . parties . . . assent by this resolution'.

From this rapid glance at the resolutions of the General Assembly it is evident that no single conclusion can be made concerning the legal status or binding force of every resolution. On the contrary the effect of a resolution must vary with the circumstances peculiar to each resolution. Two major considerations are involved. The first concerns the authority or competence of the General Assembly in regard to the subject-matter, to the addressee, and to the contemplated action or decision. The second concerns the intention of the General Assembly in adopting a given resolution, for even where a body may be competent to make a binding decision it may voluntarily limit its action to something less.

It is now proposed to analyse the binding force of a General Assembly resolution, first, by considering the possible source of obligation, and second, by considering some of the consequences flowing from a resolution.

A. SOURCES OF OBLIGATION

1. *Charter of the United Nations*

To determine the legal force of a General Assembly resolution we must first look to the organic instrument by which the Assembly was constituted —the United Nations Charter. The Member states might have signified their consent to be bound by a resolution of the General Assembly either by a direct undertaking to that effect, or by a grant of power to the General Assembly from which a resulting obligation might be inferred.

Authority of the Charter. With respect to two categories of resolutions the authority of the General Assembly is clearly set forth in the Charter. First it is expressly empowered to perform certain actions. Thus it may establish subsidiary organs (Art. 22), it may approve agreements (Arts. 63 and 85), it may elect certain members of the Councils (Arts. 23, 61, and 86), it may adopt rules of procedure (Art. 21), request advisory opinions from the International Court of Justice and authorize other organs and specialized agencies to request such opinions (Art. 96), and it may initiate amendments to the Charter (Art. 108). Upon the recommendation of the Security Council it may admit Members to the United Nations (Art. 4), suspend their rights (Art. 5), or expel them from the Organization (Art. 6), appoint the Secretary-General (Art. 97), and determine the conditions upon which a non-Member state may become a party to the Statute of the International Court of Justice (Art. 93). The General Assembly concurrently with the Security Council elects the members of the International Court of Justice (Art. 8 of the Statute). It is true that the effective exercise of certain of these powers has been prevented by the failure of the Security Council to make a recommendation, or seriously hampered by the refusal of a Member to participate in the activities of a commission or committee. It is also true that resolutions adopted within the purview of the powers enumerated above give rise only indirectly to obligations; but they do, to a degree, effect the legal relations of states, and they derive juridical effect from their authorization in the Charter. Thus the election of states to membership in a Council or Commission not only places a certain responsibility on those states to perform the functions related to the office, but creates an obligation for all Members to recognize those states as having the prerogatives accompanying such membership.

Perhaps the most important group of resolutions falling within this first category of specifically enumerated powers are those authorized under Article 17 of the Charter which establishes the General Assembly as the financial authority of the United Nations with the power to consider and approve the budget of the Organization and apportion expenses among the Member states.[1] Resolutions adopted within the purview of this Article not only create obligations binding upon Member states, but are sanctioned by the denial of the right to vote in the General Assembly to a Member which is in arrears in the payment of its financial contributions. Authority over the budget, in addition, offers to the General Assembly the possibility of effective control over the activities of the Organization.

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[1] See Doc. 1180, II/18 (1), Doc. 1092, II/1/39, *U.N.C.I.O. Documents*, vol. viii (1945), pp. 266, 495; U.N. Doc. A/C.6/SR. 116 (22 November 1948), p. 8; *A Commentary on the Charter of the United Nations*, Cmd. 6666 (1945), p. 7; *Report to the President on the Results of the San Francisco Conference*, Department of State Publication 2349 (1945), p. 57. For an analysis of similar resolutions adopted by the Assembly of the League of Nations see Wilcox, *The Ratification of International Conventions* (1935), pp. 274 ff.

The second category of binding resolutions for which authority is easily discernible in the Charter are those addressed to organs of the United Nations which are placed under the control of the General Assembly. It is a logical inference, confirmed by practice, that resolutions containing terms of reference and other directives are binding upon the *subsidiary* organs of the General Assembly established by it under Article 22 of the Charter.

In addition it is specified by Article 60 that the Economic and Social Council is under the authority of the General Assembly, and it is provided by Article 66 that the Council shall perform such functions as fall within its competence in connexion with the carrying out of recommendations of the General Assembly and such other functions as may be assigned to it by the General Assembly. Article 87 states that the Trusteeship Council operates under the authority of the General Assembly. The Charter also provides that the Secretary-General shall perform such functions as are entrusted to him by the General Assembly (Art. 98) and that the staff of the Secretariat is to be appointed under regulations established by the General Assembly (Art. 101). Thus resolutions addressed to the Economic and Social Council, to the Trusteeship Council, and to the Secretary-General, as well as those addressed to subsidiary organs of the General Assembly, create binding obligations.[1]

While both the Economic and Social Council and the Trusteeship Council are subordinate to the General Assembly and act under its authority, the Security Council occupies a different position. It is primarily responsible for the maintenance of international peace and security, and in that field the General Assembly must defer to the Security Council. Therefore General Assembly Resolutions addressed to the Security Council have been said to have persuasive rather than binding effect.[2]

The major focus of interest, however, is not upon the two categories of resolutions just discussed, but upon the resolutions containing recommendations addressed to states under Chapter IV, Articles 10 to 14 of the Charter. Under these Articles the General Assembly may discuss any question within the scope of the Charter or relating to the powers and functions of any organs provided for in the Charter; it may discuss any questions relating to the maintenance of international peace properly brought before it; it may consider the general principles of co-operation in the maintenance of international peace and security; and it is to initiate studies for the promotion of international co-operation in the political field, for the encouragement of the progressive development of international law and its codification, for the promotion of international co-operation in the economic, social, cultural, educational, and health fields, and to assist in the realization of human rights and fundamental freedoms. On all these varied subjects the General Assembly is specifically authorized to make recommendations, with the proviso that it shall not on its own initiative make a recommendation concerning a dispute in regard to which the Security Council is exercising its functions.

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[1] See *A Commentary on the Charter of the United Nations*, Cmd. 6666 (1945), p. 17; *Report to the President on the Results of the San Francisco Conference*, Department of State Publication 2349 (1945), pp. 56, 61, 64–5. Recommendations addressed to specialized agencies brought into relationship with the United Nations have the effect ascribed to them in the agreements entered into under Art. 63 of the Charter. For example, see Art. IV of Agreement with I.L.O. and Art. V of Agreement with U.N.E.S.C.O.

[2] See Paper prepared by the United Nations Secretariat on the Relations between the Palestine Commission and the Security Council (U.N. Doc. A/AC.21/13 (9 February 1948), p. 9).

The authority expressly granted does not go beyond that of recommendation. It is assumed by most authorities that the competence of the General Assembly is limited by the 'normal', 'natural', or 'obvious' meaning of recommendation, and that it is thereby prevented from making decisions which are legally binding upon members.[1] It is submitted that this is not a necessary conclusion, and that it is in fact not fully borne out by the history of the word 'recommendation' in the practice of international conferences and assemblies.

The San Francisco Records. The records of the United Nations Conference on International Organization at San Francisco do not provide an answer as to exactly what was envisaged by the use of the word 'recommendation' in Articles 10 to 14 of the Charter. The major discussions in Committee II/2 concerned the relative spheres of action of the General Assembly *vis-à-vis* the Security Council and did not involve a definition of recommendation. There is one question, however, that was clearly decided and that was that the General Assembly should not be given the function of international legislation. The Philippine Delegation suggested that the General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the Members of the Organization after such rules had been approved by a majority vote of the Security Council.[2] When this question was put to Committee 2 of Commission II at its tenth meeting it was rejected by 26 votes to 1.[1] But while this rejection indicates that the General Assembly was not intended to have general powers of enacting new law similar to those of a national parliament, it is not a decisive indication of the juridical consequences which were envisaged for a recommendation. The enacting of legislation is not the only way in which binding decisions are made. There are statements in the records of the San Francisco Conference which suggest that the word 'recommendation' was understood by many delegations as conferring an extremely limited authority.[2] On the other hand there are suggestions that some delegations took a broader view of the authority of the General Assembly.[3] There is nowhere an authoritative interpretation of the word 'recommendation' as used in Articles 10 to 14 to be found in the San Francisco records.[4] It therefore becomes necessary to examine the history of recommendations to determine if the word had acquired a fixed meaning in international law which was generally accepted at the time of the San Francisco Conference.

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[1] Eagleton, 'Palestine and the Constitutional Law of the United Nations', in *A.J.* 42 (1948), p. 397; Eagleton, *International Government* (1948), p. 197; Gross, 'The Charter of the United Nations and the Lodge Reservations', in *A.J.* 41 (1947), p. 534; Sir Charles Webster, 'The United Nations Reviewed', *International Conciliation*, No. 443 (1948), p. 446; Schwarzenberger, *A Manual of International Law* (1947), p. 124; Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents* (1946), pp. 96, 104; cf. Lauterpacht, *Oppenheim's International Law*, vol. i (1948), pp. 378, 386, 392; but see Lauterpacht, *Report of the Human Rights Committee to the Brussels Conference of the International Law Association* (1948), p. 19, n. 2, for reference to the possibility of 'a peremptory recommendation by the General Assembly'.

[2] Doc. 2, G/14 (k), pp. 2–3; *U.N.C.I.O. Documents*, vol. iii (1945), pp. 536–7.

The Hague and Washington Conferences. A survey of pre-United Nations experience reveals no exact uniformity in international practice in regard to recommendations. The early history of international Conferences, especially that of the Hague Peace Conferences of 1899 and 1907, indicates no intention to conclude binding obligations by means of either resolutions or recommendations of the Conferences.[5] But by the time of the Washington Conference on the Limitation of Armament in 1921–2 resolutions were deemed, at least by certain representatives to the Conference, to be binding on the participating states.[6] It does not appear, however, that the term 'recommendation' was employed in creating a binding obligation.

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[1] Doc. 507, II/2/22, p. 2, *U.N.C.I.O. Documents*, vol. ix (1945), p. 70. The question whether the General Assembly should have the power to impose conventions was also negatived (Doc. 571, II/2/27, pp. 2–3, *U.N.C.I.O. Documents*, vol. ix (1945), pp. 80–1).

[2] See, for example, Doc. 2, G/7(d) 1 (31 October 1944), p. 32, *U.N.C.I.O. Documents*, vol. iii (1945), p. 220; Doc. 2, G/7(1), p. 1, *U.N.C.I.O. Documents*, vol. iii (1945), p. 345; Doc. 719, II/8, p. 7, *U.N.C.I.O. Documents*, vol. viii (1945), p. 33; Doc. 748, II/2/39, pp. 3–4, *U.N.C.I.O. Documents*, vol. ix (1945), pp. 128–9.

[3] For example, see Doc. 1151, II/17, pp. 2, 7, *U.N.C.I.O. Documents*, vol. viii (1945), pp. 191, 196; Doc. 55, P/13, p. 31, *U.N.C.I.O. Documents*, vol. i (1945), p. 446.

[4] The Dominican Republic in its observations on the Dumbarton Oaks Proposals stated: 'it would . . . be desirable that the special attributes of those organs be fixed with greater precision particularly with regard to . . . (*a*) the validity that should be given to the recommendations of the General Assembly or the Security Council, since the draft does not indicate whether or not these have imperative scope' (Doc. 176, II/2/7(1), p. 4, *U.N.C.I.O. Documents*, vol. ix (1945), p. 268). An interpretation of 'considers' was embodied in the report of the Rapporteur of Commission II (Doc. 1180, II/18(1), p. 3, *U.N.C.I.O. Documents*, vol. viii (1945), p. 267). See also Summary Report of 15th Meeting of Coordination Committee, WD. 289, CO/117 (13 June 1945). But there is no similar interpretation of 'recommendation' as used in Chapter IV.

[5] Scott, *The Hague Peace Conferences*, vol. i (1909), pp. 35–6: 'A parliament binds the dependent; a conference recommends to equal and independent nations.' See Wilcox, *The Ratification of International Conventions* (1935), pp. 264–6; Hill, *The Public International Conference* (1929), p. 214.

[6] *Conference on the Limitation of Armament* (1922), pp. 286, 598, 1474. Secretary of State

Pan-American practice. Within the framework of the International Conferences of American States, the conference resolution has played a considerable part. Writers have not been in agreement as to the force of these resolutions, and the Charter of the Organization of American States signed at the Ninth International Conference of American States held at Bogotá, 30 March to 2 May 1948, contains nothing to settle the controversy concerning their legal nature.[1] Generally speaking recommendations in Pan-American practice have not been considered binding.[2] Declarations and resolutions on the other hand 'have in many cases been regarded *de facto* as creating binding obligations, so that a state neglecting to comply with them may be called to account by the other parties to the declaration'.[3] But until the treaty of Rio de Janeiro there was no provision for a state to be bound by a resolution or declaration from which it dissented. The Inter-American procedure under this treaty, however, calls for the acceptance by all American states of the decision of a two-thirds majority in the determination of the fact of aggression and in the application of sanctions short of armed force.[4]

League experience. Perhaps the most extensive practice in regard to recommendations was in the experience of the League of Nations. Here we observe two distinct uses of the term 'recommendation'. The first is found in the Covenant and applies primarily to proceedings of the Council. The Covenant specifically provides that a certain effect be given to recommendations under Article 15. A recommendation of the Council within the purview of this article was legally operative to the extent that Members of the League were bound not to go to war with a party to a dispute which complied with the recommendation. The sanctions provided in Article 16 were applicable if this obligation was disregarded. The use of the words 'recommend' and 'recommendations' in Articles 16 and 17 should also be noted because in their context they would seem to imply a greater force than is 'normally' attached to them.[5]

Hughes as Chairman of the Conference stated: 'In other cases, the Resolutions . . . are deemed to be binding upon the Powers according to their tenor when adopted by the Conference.'

[1] See Kunz, 'The Bogotá Charter of the Organization of American States', *A.J.* 42 (1948), pp. 575, 588.

[2] Ibid., p. 568; Wilcox, *The Ratification of International Conventions* (1935), p. 269.

[3] Fenwick, *International Law* (1948), pp. 79, 205, 429.

[4] Inter-American Treaty of Reciprocal Assistance, Art. 20: 'decisions which require the application of the measures specified in Article 8 shall be binding upon all the Signatory States which have ratified this Treaty, with the sole exception that no State shall be required to use armed force without its consent.' For text see Inter-American Conference for the Maintenance of Continental Peace and Security, *Report on the Results of the Conference* (1947), p. 66. See Fenwick, 'The Voting Procedure in Inter-American Conferences', *Bulletin of the Pan American Union* (February 1948), pp. 78–80; 'The Unanimity Rule in Inter-American Conferences', *A.J.* 42 (1948), pp. 399–401; Kunz, 'The Inter-American Treaty of Reciprocal Assistance', ibid., p. 118.

[5] See particularly Art. 17, para. 4. 'If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council

In addition to the special significance attributed to the word 'recommendation' in the Covenant, another use developed in the practice of the Assembly as a means of avoiding the unanimity requirement in voting. Here a distinct line could be drawn between a resolution which was intended to create a binding obligation and a recommendation or *vœu* which was not intended to have legal force. The resolution required unanimity; the *vœu* could be adopted by a simple majority.[1]

There are two reasons, however, why this practice of the Assembly of the League cannot be considered an acceptable precedent in determining the meaning of recommendation. First, recommendation is not an exact translation of *vœu*,[2] and the French text of the Charter of the United Nations uses *recommendation*, not *vœu*. Secondly, *vœux*, as already indicated, were passed by a simple majority of the League Assembly. It is generally considered that the two-thirds majority required for the adoption by the General Assembly of decisions on important questions represents a forward step towards the democratic principle of majority rule from the League requirement of unanimity.[3] This would not be true if a recommendation adopted by the General Assembly of the United Nations had no more significance than a *vœu* adopted by the League Assembly. It might therefore be supposed that the intention was to approximate a recommendation of the General Assembly to a resolution, rather than to a *vœu*, of the League Assembly.

The binding character of a resolution of the League Assembly, even though adopted unanimously, has been questioned.[4] However, the better view supports the position that League Assembly Resolutions could impose binding obligations on states.[5] Professor Lauterpacht stated: 'Probably there is no good reason for denying generally that a State may undertake a

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may take such measures and make such recommendations as *will* prevent hostilities and *will* result in the settlement of the dispute.' *Italics added.*

[1] Riches *The Unanimity Rule and the League of Nations* (1933), p. 104; Burton, *The Assembly of the League of Nations* (1941), pp. 182–7; Pastuhov, *A Guide to the Practice of International Conferences* (1945), p. 136.

[2] See Dunn, *The Practice and Procedure of International Conferences* (1929), p. 119.

[3] Doc. 415, II/1/18 and Doc. 298, II/1/12, *U.N.C.I.O. Documents*, vol. viii (1945), pp. 354, 510; *Report to the President on the Results of the San Francisco Conference*, Department of State Publication 2349 (1945), p. 60: 'It is significant that no one seriously considered perpetuating the unanimity rule which operated in the League of Nations and in many other international bodies.' See Goodrich and Hambro, *Commentary and Documents* (1946), p. 112; Spaak, 'The Role of the General Assembly', in *International Conciliation*, No. 445 (1948), p. 600; Kaeckenbeeck, 'La Charte de San-Francisco dans ses Rapports avec le Droit International', in *Recueil des Cours, Académie de Droit International*, vol. 70 (1947) (i), p. 158.

[4] H. A. S., 'The Binding Force of League Resolutions', see this *Year Book*, 16 (1935), p. 157; see Brierly, 'The Meaning and Legal Effect of the Resolution of the League Assembly of March 11, 1932', ibid., pp. 159–60.

[5] Annex V of League of Nations, *Rules of Procedure of the Assembly* (rev. ed. April 1937), pp. 26–8; *Oppenheim*, vol. i (1948), p. 139; Wilcox, *The Ratification of International Conventions* (1935), p. 284; Schindler, *Die Verbindlichkeit der Beschlüsse des Völkerbundes* (1927) (see Kuhn, Book Review in *A.J.* 22 (1928), p. 228); Riches, *The Unanimity Rule and the League of Nations* (1933), p. 104; Pastuhov, *A Guide to the Practice of International Conferences* (1945), p. 136.

binding obligation by consenting to a Resolution of the [League] Assembly. Ratification of a signed treaty is not the only way of assuming binding obligations in International Law.'[1]

International Labour Organization. The term 'recommendation' has had a special meaning in the practice of the International Labour Organization, and a recommendation adopted by two-thirds of the Conference creates a limited obligation as specified in Article 19, paragraph 6, of the Constitution of that Organization. It has been pointed out that an I.L.O. recommendation has more weight than a resolution adopted by the International Labour Conference, and that 'resolutions . . . correspond thus rather to *vœux* adopted by the Assembly of the League, and recommendations adopted by the Labour Conference correspond rather to the resolutions adopted by the Assembly of the League'.[2]

It must be noted that the obligation created by such recommendations is only to submit them to the competent national authority for consideration, and to report on the position of the law and practice in regard to the matters dealt with. There is no obligation to comply with the recommendation. But the word 'recommendation' also appears in Articles 28 and 33 of the I.L.O. Constitution in a context which implies a binding force in relation to recommendations of a Commission of Inquiry. In fact, Article 33 places a recommendation of the Commission of Inquiry on an equal basis, for the purpose of that article, with a decision of the International Court of Justice.[3]

From this survey of pre-United Nations experience it is clear that there was no single meaning of the term 'recommendation' accepted in international practice. It is true that prevailing practice has employed the word in a non-imperative sense. However, there is sufficient contrary usage to cast a reasonable doubt on the assumption that a 'recommendation' under Articles 10 to 14 of the Charter can obviously have no legal effect.

The practice of the Security Council. This doubt is not dispelled by a study of other parts of the Charter in which the term 'recommendation' appears. It has been stated that the distinction between 'recommendation' as indicating a non-obligatory determination and 'decisions' as indicating a binding determination is characteristic of the drafting of the Charter. Such usage is not consistently followed in the text of the Charter, and no conclusive result may be drawn therefrom. In this regard particular attention should be directed to Article 18 in which certain 'recommendations' are specifically enumerated among the important 'decisions' requiring a two-thirds majority vote by the General Assembly.

For comparative purposes the use of the term 'recommendation' in

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[1] *Oppenheim*, vol. i (1948), p. 139, n. 1.

[2] Pastuhov, *A Guide to the Practice of International Conferences* (1945), pp. 136–7, n. 42.

[3] However, an appeal may be taken from a recommendation of a Commission of Inquiry to the International Court of Justice (Arts. 29–32).

Chapters VI and VII of the Charter are of special interest. The binding character of a recommendation of the Security Council under Chapter VI (Pacific Settlement of Disputes) has already been the subject of considerable controversy in the Security Council, and has even figured in argument before the International Court of Justice.

At the San Francisco Conference the question was posed by the Belgium delegate who asked whether the term 'recommend' in Chapter VIII, Section A of the Dumbarton Oaks proposals (Chapter VI of the Charter) 'entailed obligations for States, parties to a dispute'. In answer the delegates of the United States and the United Kingdom stated that 'in Section A no compulsion or enforcement was envisaged'.[1]

The form in which this assurance appears does not make it an authoritative interpretation of the Charter, and it has not been accepted as such by all Members of the United Nations, or even, as would appear from the proceedings in the *Corfu Channel* case, by the United Kingdom.[2] The discussions in the Security Council both on the *Corfu Channel* case and on the Greek question showed an inclination on the part of many delegates to consider that binding obligations could be created by recommendations. Perhaps this position was most clearly stated by Colonel Hodgson of Australia at the 127th meeting of the Security Council on 9 April 1947 in discussing a draft resolution under Article 36 of the Charter. He said: 'Any decision, any recommendation that we may make binds the United Kingdom and also binds Albania.'[3]

This view was relied upon by the United Kingdom in submitting the *Corfu Channel* case to the International Court of Justice by way of application rather than by special agreement, and in arguing that an instance of compulsory jurisdiction was established.[4] Eight judges constituting a majority of the regular members of the Court found it unnecessary to express an opinion on this point,[1] whereas seven of the regular judges attached importance to expressly rejecting the United Kingdom interpretation.[2] Dr. Daxner, the judge appointed *ad hoc* by Albania, in his dissenting opinion considered the status of recommendations at length, and endeavoured to demonstrate that a recommendation made by the Security Council could not impose an obligation.[3]

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[1] Doc. 498, III/2/19, *U.N.C.I.O. Documents*, vol. xii (1945), p. 66. In the Report of the Rapporteur of Committee III/2 approved by Committee III/2, 16 June 1945, the following statement appears: 'In the course of discussion on an amendment offered by the Delegation of Belgium, the Delegates of the United Kingdom and the United States gave assurance that such a recommendation of the Security Council possessed no obligatory effect for the parties' (Doc. 1027, III/2/31(1), *U.N.C.I.O. Documents*, vol. xii (1948), p. 162). See also Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents* (1946), p. 122.

[2] But see statement by Sir Hartley Shawcross (U.N. Doc. A/C.6/SR. 68 (7 October 1948), pp. 5–6).

[3] Security Council, *Official Records*, 2nd year, No. 34, p. 723. See also opinion of Chinese delegate on p. 726. For opinions expressed while discussing the Greek question see U.N. Doc. S/PV/166 (24 July 1947), pp. 76–100. The representative of Yugoslavia argued that under Chapter VI the Security Council could not take decisions binding upon the parties. The delegates of the United States and France expressed disagreement with this view. See particularly the statement of Mr. Johnson (U.S.) at p. 82. For a summary of views see *International Organization*, vol. i (1947), p. 503: 'Although no decision was reached in the argument, it was clear that the majority of the other members of the Council felt that Articles 25, 27(3), 29 and 34 all provided the Council with the power to choose means appropriate to an investigation and bound Member states to accept its recommendations.' See also Kelsen, 'The Settlement of Disputes by the Security Council', *The International Law Quarterly* (Summer 1948), p. 212.

[4] International Court of Justice, Distr. 151, 1947, General List No. 1. See Hudson, 'The Twenty-sixth Year of the World Court', *A.J.* 42 (1948), pp. 2–3; Sloan, 'The World Court and

So far there has been no decisive conclusion reached concerning the binding nature of recommendations under Chapter VI, but should it be determined that these recommendations were not binding such a conclusion would appear to rest on the general nature of the powers of the Security Council in relation to pacific settlement rather than upon the meaning of the word 'recommendation'. It will be noted that the term 'recommendation' appears not only in Chapter VI but also in Article 39 of Chapter VII. The statement made by the United Kingdom and United States delegates at San Francisco referred only to Chapter VI and not to Chapter VII. The commentary of Goodrich and Hambro on Article 25 also omits Article 39 from the conclusion that 'The word "decision" as used in this Article clearly does not include recommendations which the Security Council is empowered to make under Articles 36, 37 and 38'.[4]

Professor Kelsen, after observing that according to one interpretation 'recommendations' made under Articles 36, 37, and 38 have no binding force, states:

> 'However, under Article 39 the Security Council may consider non-compliance with its recommendation a threat to the peace and resort to enforcement action against the recalcitrant State. If such enforcement action is interpreted to be a sanction, a recommendation of the Security Council may constitute the obligation to comply with the recommendation, that is to say, the so-called "recommendation" may have the same character as a "decision" of the Security Council, binding upon the members under Article 25.'[5]

It should be pointed out that under the 'chain of events' argument which has been used in justification of the application to Chapter VI of the principle of unanimity of the permanent members (the veto), Professor Kelsen's argument applies to a recommendation under Chapter VI as well as to a

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the United Nations', *Iowa Law Review*, 33 (1948), p. 654; Feaver, 'The Corfu Channel Case: The Preliminary Objection of Albania', *The Canadian Bar Review*, 26 (1948), pp. 929–31.

[1] The *Corfu Channel* case, Preliminary Objection, Judgment of 25 March 1948, p. 26.

[2] Ibid., pp. 31–2.

[3] Ibid., pp. 33–5. See Hudson, 'The Corfu Channel Case', *American Bar Association Journal*, 34 (1948), p. 469.

[4] Goodrich and Hambro, op. cit., p. 122. But see their comment on Art. 39, ibid., pp. 157–8, citing Doc. 881, III/3/46, p. 6, *U.N.C.I.O. Documents*, vol. vii (1945), p. 507; *Hearings before the U.S. Senate Committee on Foreign Relations on the Charter of the United Nations* (1945), pp. 281–2.

[5] Kelsen, 'The Settlement of Disputes by the Security Council', *The International Law Quarterly* (Summer 1948), pp. 212–13.

recommendation under Article 39 since failure to comply with either recommendation might eventually result in the application of sanctions under Chapter VII. Thus the status of recommendations under Chapter VI, and more particularly under Chapter VII, cast considerable doubt upon a consistent use of the word 'recommendation' in the Charter in a non-obligatory sense.[1]

Imperative use of 'recommend'. A private law analogy drawing upon judicial experience in the interpretation of precatory words in wills is of more than casual interest. Such words as 'wish', 'desire', 'request', and 'recommend' have properly been considered imperative when it appeared that the testator had employed them with that intention. There are both English and American cases in which the word 'recommend' has been held to create a judicially enforceable trust or to give rise to a valid remainder.[2] On the other hand, courts have held that the word 'recommend' is non-obligatory when the context of the will indicated that such was the testator's intent.[3]

Other imperative uses of 'recommend' will come readily to mind. The General Assembly itself has used the words 'request' and 'recommend' in resolutions which may be considered binding. For the General Assembly has used these words not only in addressing Member states and the Security Council, but also in addressing the Economic and Social Council and the Trusteeship Council which, as has been pointed out, are placed under its authority by the Charter, and in addressing the Secretary-General who is enjoined by the Charter to perform the functions which are entrusted to him by the General Assembly. In resolutions addressed to the latter organs, the General Assembly has also used 'instruct' and 'direct', but the resolutions employing 'request' and 'recommend' would seem, in most cases, to be equally binding upon these organs. For an example, the Second Session of the General Assembly adopted on the same day two resolutions in which the Secretary-General was entrusted with the function of undertaking the necessary preparatory work for the International Law Commission, with particular reference to the draft declaration on the rights and duties of states.

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[1] It may also be noted that the word is used in several articles of the Charter in which the General Assembly is authorized to take a decision 'upon the recommendation of the Security Council' (Arts. 4, 5, 6, 93, 97). Here practice has established that the power of recommendation gives to the Security Council equal voice with the General Assembly in making a decision. It is true that the recommendation of the Security Council is not of itself sufficient to effect action and may be rejected by the General Assembly but it seems equally true that the General Assembly cannot take action except in accordance with the recommendation.

[2] *Cholmondeley* v. *Cholmondeley* (1845), 14 Simons' Reports 590 (1845); *Hart* v. *Tribe* (1854), 18 Beavan's Reports 215; *Colton* v. *Colton* (1887), 127 U.S. 300; *Chambers* v. *Davis* (1867), 93 American Decisions 605.

[3] *Young* v. *Martin* (1843), 2 Younge and Collyer's Chancery Reports 582; *Johnston* v. *Rowlands* (1848), 2 De Gex and Smale's Reports 356; *Crowell* v. *Chapman* (1926), 257 Massachusetts 492; *In re Whitcomb's Estate* (1890), 86 California 265.

In Resolution 175 (II) the word 'instructs' appears; in Resolution 178 (II) the word 'requests' is used. It is submitted that there is no difference in the obligation arising under these two resolutions. It is likewise submitted that in the language of diplomacy the words 'request' and 'recommend' when addressed to a state might well be translated into something more than their non-obligatory or 'normal' meaning.[1] It therefore appears that the authority granted to the General Assembly by use of 'recommendation' in Articles 10 to 14 of the Charter is not so obviously limited by that word as most observers have supposed.

Obligations of Charter. Turning now from the examination of the authority granted to the General Assembly, we may briefly consider the direct obligations assumed by Members under the Charter. The most important of these are found in the Principles, contained in Article 2, which are binding on Members, although it is true that paragraphs 1 and 7 which state the principles of sovereign equality and of non-intervention in domestic affairs actually limit rather than impose obligations upon Member states. The obligations assumed by Members in their relationship to the Security Council are also of great importance.[2]

There is, however, in the Charter no express undertaking to accept recommendations of the General Assembly similar to the agreement in Article 25 to accept and carry out decisions of the Security Council. On the other hand, it cannot be said that the Charter specifically negates such an obligation, and it may be possible to deduce certain obligations from the Charter as a whole which it would be impossible to establish from an express undertaking. Thus Professor Lauterpacht has argued convincingly that the Charter imposes a legal obligation upon the Members to respect human rights, although there is no express provision by which the Members so agree.[3]

While the evidence in support of an implied undertaking to be bound by recommendations of the General Assembly is extremely meagre, there are some indications in the Charter that might be advanced in favour of such an inference. It has been suggested that, inasmuch as there are specific undertakings to accept decisions of the Security Council and to comply with decisions of the International Court of Justice, the general undertaking in paragraph 2 of Article 2 has special significance for obligations arising from action taken by the General Assembly.[1] This does not appear to have been a purpose envisaged when drafting this paragraph, but it was intended rather to emphasize the reciprocal relation between the rights and benefits of membership and the good faith fulfilment of obligations specified in the Charter.[2] But the suggestion is not one to be lightly discarded. Some support might be found in the pledge of all Members under Article 56 to take joint and separate action in co-operation with the Organization in the economic and social field.

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[1] See Duncan Hall, 'The International Frontier', *A.J.* 42 (1948), p. 63.

[2] E.g., Arts. 24, 25, 43, 45, 48, and 49. Art. 25 reads: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' Other obligations of significance are as follows: Art. 56—Members pledge themselves 'to take joint and separate action in cooperation with the Organization for the purposes set forth in Article 55'; Art. 73—Members accept as a sacred trust certain obligations in regard to non-self-governing territories; Arts. 84 and 88—Duties of authority administering trust territory; Art. 94—Undertaking to comply with the decision of the International Court of Justice in any case to which the Member is a party; Art. 100—Undertaking to respect exclusively international character of the responsibilities of the Secretary-General and his staff; Art. 102—Obligation to register treaties with the Secretariat.

[3] Lauterpacht, *Report of the Human Rights Committee to the Brussels Conference of the International Law Association* (1948), p. 13: 'Admittedly there is in the Charter no express provision in which the Members of the United Nations agree, *eis verbis*, to respect human rights and fundamental freedoms. But it is out of keeping with the spirit of the Charter and, probably, with the accepted canons of interpretation of treaties to attach decisive importance to that omission.' See Lauterpacht, 'The Subjects of the Law of Nations', *Law Quarterly Review*, 64 (1948), pp. 101–3.

An indication of an implied obligation in relation to the proceedings of the General Assembly in the pacific settlement of disputes might also be discovered in paragraph 2 of Article 35.[3] Under this provision a state which is not a Member of the United Nations, before it can bring a dispute to the attention of either the General Assembly or the Security Council, must accept obligations of pacific settlement. These obligations may refer only to the general undertakings of Article 2, paragraphs 3 and 4.[4] But in view of the emphasis placed on pacific settlement in the Charter, the position that it occupies in the Purposes and Principles of the Organization, and its importance to a well-ordered international community, one should be extremely reluctant to deny a more tangible content to 'the obligations of pacific settlement' referred to in Article 35.

We may now summarize briefly the extent to which the Charter of the United Nations itself consecrates resolutions of the General Assembly as binding. There are two categories where legal effect is clearly established. First, there are resolutions adopted under articles of the Charter by which the General Assembly is authorized to take specific action. Secondly, there are resolutions addressed to organs of the United Nations which are subject to the authority of the General Assembly. In regard to a third and most important category, namely, resolutions containing recommendations addressed to states, no general assertion of binding effect can be made on the basis of the Charter. Their non-obligatory status, however, is far from being as definitely established as has been assumed by most writers. The most that can be said is that there is a presumption against these recommendations possessing binding legal force. But it is not an irrebuttable presumption, and it will be the purpose of the three immediately succeeding sections of this article to explore possible circumstances under which a recommendation of the General Assembly addressed to states may be legally binding upon them.

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[1] Art. 2, para. 2: 'All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.'

[2] See *Report to the President on the Results of the San Francisco Conference*, Department of State Publication 2349 (1945), p. 40; Goodrich and Hambro, op. cit., p. 66.

[3] Art. 35, para. 2: 'A State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party, if it accepts in advance, for the purpose of the dispute, the obligations of pacific settlement provided in the present Charter.'

[4] And of Art. 25 and Art. 2 (5). But these latter obligations appear to have special relevance to obligations of members participating in enforcement action.

2. *Special agreements*

The clearest example of General Assembly recommendations which create legal obligations are those cases in which the parties have agreed to accept a recommendation as binding. The leading instance of such an agreement is found in Annex XI to the Treaty of Peace with Italy. In a joint declaration made by the Soviet Union, the United Kingdom, the United States, and France concerning Italian Territorial Possessions in Africa the Four Powers stated that should they be unable to agree upon the disposal of these territories within one year from the coming into force of the Treaty of Peace with Italy the matter should 'be referred to the General Assembly of the United Nations for a recommendation, and the Four Powers agree to accept the recommendation and to take appropriate measures for giving effect to it'.[1]

Commenting upon this joint declaration Dr. Louis B. Sohn has written: 'States can, therefore, agree in advance to be bound by Assembly recommendations; and with respect to states parties to such an agreement, such recommendations will be as effective as if they were laws enacted by an international legislature with powers similar to a national legislative body.'[2]

In certain trusteeship agreements the administering authority has undertaken to apply in the trust territory 'the provisions of any international conventions and recommendations already existing or hereafter drawn up by the United Nations or by its specialized agencies referred to in Article 57 of the Charter, which may be appropriate to the particular circumstance of the territory and which would conduce to the achievement of the basic objectives of the international trusteeship system'.[3] This undertaking would appear on its face to be broad enough to cover certain recommendations of the General Assembly, and thus to establish another situation in which they might be binding.

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[1] This question was on the agenda of the First Part of the Third Session of the General Assembly, but its consideration was postponed until 1949.

[2] 'The Second Year of United Nations Legislation', *American Bar Association Journal*, 34 (1948), p. 315.

[3] Art. 7 of the Trusteeship Agreements for the Territories of Togoland, Cameroons, and Tanganyika (British Administration). See also Art. 6 of the Trusteeship Agreements for the Territories of Togoland and the Cameroons (French Administration). Compare with Art. 6 of the Trusteeship Agreement for the Territory of New Guinea (Australian Administration) in

There is considerable precedent in the practice of the League of Nations for the special agreement of parties to be bound by recommendations, and that practice has been stamped with approval by the Permanent Court of International Justice. In the settlement of the frontier between Germany and Poland in Upper Silesia the Supreme Council of the Principal Allied Powers asked the Council of the League of Nations for a 'recommendation' and these Powers undertook in advance to accept the solution recommended.[1] Similarly, in the Protocol of Venice of 13 October 1921 Austria agreed to accept 'the decision recommended by the Council of the League of Nations' concerning the delimitation of its frontier with Hungary.[2] Each of these instances was cited as a precedent by the Permanent Court of International Justice in its Advisory Opinion Concerning Article 3, paragraph 2 of the Treaty of Lausanne (*The Mosul* case). In this opinion the Court stated:

> 'There is nothing to prevent the Parties from accepting obligations and from conferring on the Council powers wider than those resulting from the strict terms of Article 15 [of the Covenant], and in particular from substituting, by an agreement entered into in advance, for the Council's power to make a mere recommendation, the power to give a decision which, by virtue of their previous consent, compulsorily settles the dispute.'[3]

It may also be of interest to note that there have been special agreements to accept advisory opinions of the Permanent Court of International Justice as binding, such, for example, as the undertaking by the British and French Governments in regard to the opinion in the Nationality Decrees in Tunis and Morocco,[4] and the undertaking in Article 5 of the Geneva Protocol of 2 October 1924.[5] In addition there are several recent conventions in which states have agreed that in regard to certain disputes the opinion given by the International Court of Justice 'shall be accepted as decisive by the parties'.[6]

A binding obligation may not only result from an agreement in advance to accept recommendations but may also result from an acceptance of a

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which only 'recommendations of specialized agencies are covered'; Art. 7 of the Trusteeship Agreement for the Territory of Ruanda-Urundi (Belgian Administration) in which no reference is made to recommendations; and Art. 7 of the Trusteeship Agreement for the Territory of Western Samoa (New Zealand Administration) in which the undertaking to apply recommendations drawn up by the United Nations is modified by the clause 'which are, in the opinion of the Administering Authority, appropriate . . .'.

[1] League of Nations, *Official Journal*, 1921, pp. 982, 1221.

[2] League of Nations, *Treaty Series*, vol. ix, p. 209.

[3] *P.C.I.J.*, Ser. B, No. 12, p. 27.

[4] Ibid., Ser. C, No. 2, p. 257.

[5] Hudson, *International Legislation*, vol. ii, p. 1383.

[6] Convention on the Privileges and Immunities of the United Nations, Section 30; Convention on the Privileges and Immunities of the Specialized Agencies, Section 32; see International Trade Organization Charter, Art. 96.

recommendation after it has been made.[1] In the advisory opinion on the *Jaworzina Boundary* the Permanent Court interpreted the effect of a joint declaration by the duly authorized representatives of the Polish and Czechoslovak Governments in which they accepted a decision of the Conference of Ambassadors. The Court was of the opinion that this joint declaration gave to the decision the force of a contractual obligation entered into by the parties.[2]

It must be pointed out that while a recommendation of the General Assembly may possess binding force by virtue of a special agreement between states, this legal effect is not derived from the recommendation itself but from the instrument in which the special agreement is found.[3] Nevertheless the effect as to recommendations covered by such agreements is the same as if the recommendations themselves possessed the force of law. There is no legally valid objection to such agreements and it may be hoped that states will enter into more undertakings of this kind. Not only could these agreements apply to specific matters and involve only a few states, but they might also in time be widened to include undertakings in multilateral conventions to accept broad categories of General Assembly recommendations as legally binding. Eventually such undertakings might even be embodied in amendments to the Charter.

3. *Custom*

Not only may recommendations gain binding force through explicit consent given in the form of a treaty or agreement, but they might also achieve legal effect through the growth of a customary rule of international law. From one viewpoint state practice might produce immediate results, since in the interpretation of treaties subsequent practice can be adduced as evidence of the intention of the parties.[4] However, when, as at present, no consistent practice is immediately forthcoming it is necessary to look towards an evolution of customary law in the more distant future. Professor Pitman B. Potter writes:

> 'It is barely possible that the [General] Assembly may succeed in developing such [legislative] powers by usage, in spite of the legal presumption against such power in absence of express authorization, and in spite of the opposition which would inevitably

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[1] For argument by the representative of the Jewish Agency for Palestine that the recommendation of the General Assembly for Partition of Palestine was accepted by the mandatory power as a 'decision' see U.N. Doc. S/PV.258 (27 February 1948), pp. 19–20. Whether or not the consent of a state to be bound may be inferred from its affirmative vote on a recommendation will be discussed in section 4 following.

[2] See Schwarzenberger, *International Law*, vol. i, p. 212, citing *P.C.I.J.*, Ser. B, No. 8, pp. 29–30. See also Advisory Opinion of 15 October 1931 concerning Railway Traffic between Lithuania and Poland, ibid., Ser. A/B, No. 42; *Oppenheim*, vol. i (1948), p. 139, n. 1.

[3] Cf. Hudson, *The Permanent Court of International Justice, 1920–1942* (1943), p. 513; 'The Effect of Advisory Opinions of the World Court', *A.J.* 42 (1948), p. 632.

[4] Pollux, 'The Interpretation of the Charter', this *Year Book*, 23 (1946), p. 78.

be encountered, at least at first, just as the League Assembly developed a function of preparing and sponsoring multipartite conventions ('international legislation'?) in similar circumstances. On this issue time alone can give a reply.'[1]

Experience in regard to international awards of arbitral tribunals and judicial decisions of international courts may be considered as a precedent. Although there is usually an express treaty provision to the effect that such awards are binding upon the parties, these provisions are considered declaratory of an existing rule of positive law developed through custom.[2] With regard to advisory opinions of the Permanent Court there was considerable disagreement as to whether they gained binding force through usage. There is no general undertaking to comply with advisory opinions similar to the obligation concerning decisions of the Permanent Court of International Justice and the International Court of Justice. Nevertheless practice has so nearly assimilated advisory to contentious proceedings and the observance of such opinions has been so universal that it has been argued that a rule of customary international law has developed.[3] This argument has been vigorously disputed by Judge Hudson and others who insist that practice has in no way changed the binding force of an advisory opinion, and that it remains exactly what 'it purports to be'.[4] It is not necessary to determine for the purposes of this paper whether custom has or has not made advisory opinions binding. The method by which this might have been accomplished, however, illustrates a possible line of development for General Assembly recommendations. ✓

For recommendations to become binding by custom it would be necessary (1) that they be generally observed, and (2) that eventually they be observed from a sense of duty. Applying these tests, a survey of General Assembly resolutions does not disclose the beginning of a consistent state practice upon which a customary rule of international law might rest. It has been suggested that in a number of instances the drafting of recommendations is such that verification of compliance is scientifically impossible.[5] In other instances there is a manifest intent on the part of the General Assembly to require no specific compliance.[1] In still other cases there has been general co-operation, but not necessarily from a sense of legal obligation.[2] Finally there are those few, but politically important, recommendations where there has been non-compliance and even open defiance.[3] It may be significant, however, that in these instances the Member state has deemed it necessary to give a legal argument for its non-compliance. Usually it has insisted that failure to co-operate is justified because the resolution is contrary to the Charter and therefore invalid.[4] This practice is reminiscent of those instances in which states have refused to comply with arbitral awards, and have sought to justify their non-compliance by alleging *excès de pouvoir* or other procedural irregularity in the proceedings of the tribunal.[5] In some instances, however, the state has also argued that recommendations create no legal obligation.[6]

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[1] *An Introduction to the Study of International Organization* (1948), p. 265.

[2] Hudson, *International Tribunals* (1944), p. 124.

[3] Politis, Records of 9th Assembly, First Committee (1928), *League of Nations Official Journal*, Special Supplement, No. 65, p. 47; *P.C.I.J.*, Ser. E, No. 4, p. 76; Goodrich, 'The Nature of the Advisory Opinions of the Permanent Court of International Justice', *A.J.* 32 (1938), pp. 738–58.

[4] Hudson, *The Permanent Court of International Justice, 1920–1942* (1943), pp. 511–13; 'The Effect of Advisory Opinions of the World Court', *A.J.* 42 (1948), p. 630. See U.N. Doc. A/C.6/SR.124 (27 November 1948), pp. 4–5.

[5] Verification of compliance with parts of the following resolutions might be difficult because of the vagueness of the wording or the discretion left to the Member states: Resolution 41 (I) (14 December 1946) on Principles governing the general regulation and reduction of Armaments; Resolution 44 (I) (8 December 1946) on Treatment of Indians in the Union of South Africa; Resolution 110 (II) (3 November 1947) on Measures to be taken against propaganda and the inciters of a new war; Resolution 136 (II) (17 November 1947) on international co-operation for the prevention of immigration which is likely to disturb friendly relations between nations.

The question of non-compliance has received the fullest discussion in the General Assembly in regard to the recommendation to the Union of South Africa to place the mandated territory of South West Africa under United Nations Trusteeship.[7] Although the Union of South Africa announced that it considered itself under no legal obligation to propose a trusteeship agreement, it did defer to the General Assembly to the extent of not proceeding immediately with the incorporation of South West Africa into the Union as it had planned. In the general discussions in the Fourth Committee at least twenty states expressed the view that there was a legal obligation, whereas eleven states could not agree with this position.[8] The issues were complex and the arguments in support of a legal obligation rested in the first instance upon the provisions of Chapter XII of the

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[1] For example: Resolution 133 (II) (17 November 1947), Exchange of workers (The operative portion begins '*Urges* those Members which are agreeable . . .'); Resolution 144 (II) (3 November 1947), Voluntary transmission of information regarding the development of self-governing institutions in the Non-Self-Governing Territories (The operative portion begins '*Considers* that the voluntary transmission . . .').

[2] Resolution 39 (I) (12 December 1946) on the Relations of Members of the United Nations with Spain is an example of an important political recommendation, which, despite some disagreement, has been generally observed. See *Annual Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/315 (14 July 1947), p. 3. Other examples include resolutions on economic, social, and humanitarian questions. See *Annual Report of the Secretary-General on the Work of the Organization, 1 July 1947–30 June 1948*, U.N. Doc. A/565, pp. 46–89.

[3] These Resolutions are 181 (II) (29 November 1947) on Future Government of Palestine; 65 (I) (14 December 1946) on Future Status of South West Africa; 109 (II) (21 October 1947) on Threats to the Political Independence and Territorial Integrity of Greece; 111 (II) (13 November 1947) on Establishment of an Interim Committee of the General Assembly; and 112 (II) (14 November 1947) The Problem of the Independence of Korea.

[4] See U.N. Docs. A/PV.100 (21 October 1947), p. 2; A/PV.110 (13 November 1947), p. 121; A/PV.112 (14 November 1947); A/PV.128 (29 November 1947), pp. 91–101; A/C.4/SR.38 (7 October 1947), p. 4; see A/PV.144 (27 September 1948), p. 57.

[5] See Hudson, *International Tribunals* (1944), p. 131.

[6] See U.N. Doc. S/PV.254 (24 February 1948), p. 21; A/PV.105 (1 November 1947), p. 196.

[7] Resolution 65 (I), 14 December 1946.

[8] *Report of the Fourth Committee*, U.N. Doc. A/422 (27 October 1947), pp. 2–3.

Charter and only secondarily upon the binding force of the recommendation of the General Assembly.[1] A thorough analysis of the Assembly discussion indicates that the question concerning the legal effect of a recommendation was left unresolved.[2]

There is thus far no evidence that a custom by which recommendations of the General Assembly might become legally binding is in the process of development. The contrary might be presumed from the most notorious instances of non-observance which have captured the headlines in the press. It is submitted, however, that it is too early to reach a conclusion one way or another, and that the way is not foreclosed either by the Charter or by existing practice for the growth, under more propitious circumstances, of a customary rule of law.

There is one additional aspect which should not be overlooked, for though unspectacular, it is capable of considerable development. Resolutions in the economic and social field are subject to a special procedure which if properly encouraged may develop into a practice similar to that provided for recommendations of the International Labour Organization.[3] Under Article 64 of the Charter, the Economic and Social Council is authorized to make arrangements with Members of the United Nations to obtain reports on the steps taken to give effect to recommendations falling within its competence made by the General Assembly. General Assembly Resolution 119 (II) of 31 October 1947 called upon all Member states to carry out all recommendations of the General Assembly passed on economic and social matters, and recommended that the Secretary-General and the Economic and Social Council make annual reports in fulfilment of Article 64 of the Charter. In accordance with this resolution extensive reports have been received from many countries which indicate that attention of the governments has been directed towards compliance.[4]

4. *Authority inherent in the position of General Assembly*

This section will not be concerned with the central position of the General Assembly within the Organization, but rather with its position as the representative organ of the world community. Much emphasis has been placed upon the position afforded to the Security Council under Article 24 by which the Members of the United Nations confer on it the principal responsibility for the maintenance of international peace and security, and agree that in carrying out its duties the Security Council acts on their behalf. But the General Assembly itself, as provided in Article 9, *consists of all the Members of the United Nations*. The General Assembly may be viewed in a dual role. It is, first, an organ of an entity having a separate legal personality. Secondly, it is a congress of fifty-eight individual nations. In its latter capacity it has certain inherent powers which need not be derived from a specific enumeration in the Charter. The Member states when they meet as the General Assembly do not lose the legal capacity which they possess at other times.[1]

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[1] Sayre, 'Legal Problems Arising from the United Nations Trusteeship System', *A.J.* 42 (1948), p. 273: 'During the Assembly and Fourth Committee debates in 1947 the question arose whether, quite apart from the controversy over the interpretation of the Charter language, the South African Union was under an obligation by virtue of the previous Assembly vote to place South West Africa under trusteeship.'

[2] For statements, made in the course of the discussion, concerning the binding force of a recommendation see U.N. Docs. A/C.4/SR.31, pp. 2–5; SR.32, pp. 2–5; SR.33, pp. 3, 5; SR.38, pp. 2, 4–8; SR.39, pp. 2, 3, 5; SR.40, pp. 1, 3; SR.45, pp. 1–3; A/PV.104, pp. 56, 77–81; A/PV.105, p. 196 (25 September to 1 November 1947).

[3] See *supra*, section 1. Procedure similar to that of the I.L.O. is provided in Article VIII of the U.N.E.S.C.O. Constitution.

[4] For texts of these Reports see U.N. Doc. E/963 and addenda 1 to 42.

The drawing up and the recommendation for acceptance of multilateral conventions has already been firmly established by practice as a regular function of the General Assembly, and would appear to be a power inherent in such a body.[2] Members, through the instrumentality of the General Assembly, may also prepare and conclude agreements binding without ratification where it is their intent to do so.[3] The question whether an affirmative vote cast by a delegation to the General Assembly can itself constitute the consent necessary to give rise to a binding contractual obligation will be subject to greater controversy, but where the intention is to be so bound there is no reason why it should not be given effect.[4]

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[1] Since states must act through representatives a question as to the authority of these representatives does arise. For the exercise of those powers enumerated or implied in the Charter the usual credentials of a representative to the General Assembly are sufficient. For the exercise of other powers such as the signing or ratifying of conventions or the making of certain agreements not covered by the Charter special credentials may be required. See U.N. Doc. A/C.3/SR.88 (2 October 1948), p. 5 for reference to special powers required by representatives for ratification of a protocol on Narcotic Drugs.

[2] A proposal to include a specific reference to this function in the Charter failed by one vote of receiving the necessary two-thirds majority in Committee II/2. Doc. 536, II/2/24, p. 2, *U.N.C.I.O. Documents*, vol. ix (1945), p. 75; Doc. 571, II/2/27, pp. 1–2, ibid., pp. 79–80. Compare Charter of the United Nations, Art. 62, para. 3, and Art. 105, para. 3. For the development of a similar practice by the League of Nations see Burton, *The Assembly of the League of Nations* (1941), chap. 12.

[3] That states can undertake binding obligations without the traditional formalities of treaty making seems well established in modern state practice. See Wilcox, *The Ratification of International Conventions* (1935), chap. 8. The United Nations has developed a procedure by which agreements become binding by (i) signature without reservation as to approval; (ii) signature subject to approval followed by acceptance; or (iii) acceptance. See, for example, Art. 18 of Constitution of the International Refugee Organization, Resolution 62 (I), 15 December 1946.

[4] In General Assembly Resolution 24 (I), 12 February 1946, on the Transfer of Certain Functions, Activities, and Assets of the League of Nations the following appears: 'The General Assembly records that . . . parties . . . assent by this resolution. . . .' Professor Lauterpacht has suggested that an International Bill of the Rights of Man should 'become binding, without any necessity of ratification, upon Members of the United Nations whose duly accredited and authorized representatives . . . cast their vote in favor of the Bill' (*Report of Human Rights Committee to Brussels Conference, 1948, of the International Law Association*, p. 69 (Art. 26 of Bill)). Cf. Lauterpacht, *Oppenheim's International Law*, vol. i (1948), p. 139; Schwarzenberger, *International Law*, vol. i (1945), pp. 473–4.

An interesting problem is raised by an Article appearing in many of the Trusteeship Agreements which is as follows:

> 'If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice provided for in Chapter XIV of the United Nations Charter.[1]

Clearly the Administering Authority which is a party to the agreement is under an obligation to submit disputes to the International Court. Did the approval of this agreement by the United Nations bind the Members other than the Administering Authority? The use of the word *shall* seems to imply a binding obligation for all Members. The preparatory discussions throw little light on the question.[2] Many states, whether or not they voted in favour of the agreement, would be surprised to find that they had accepted the compulsory jurisdiction of the Court for cases in this category, yet it is difficult to escape from the conclusion that they have done so.[3]

It seems clearly inherent in the position of the General Assembly that Members can take steps within the Organization to reach binding agreements. It also appears true that consent to such agreements may be expressed by a vote in the General Assembly. But when we consider the next logical step, namely, the extent to which the General Assembly possesses power to bind states that have not voted in favour of a resolution, we must abandon the firm ground of established principle and approach the realm *de lege ferenda*.

Nevertheless, it is submitted that there is an inherent power in the General Assembly as the most nearly representative organ of the international community to impose its will in limited fields. The limitation of power of the General Assembly is not derived so much from the meaning of the word 'recommend' which is not always used in a non-obligatory sense, but is rather to be found in established axioms of international law retained in the Charter under the principles of 'sovereign equality' and 'domestic jurisdiction'.[4] But if these principles were ever considered absolute, they certainly cannot be regarded as such to-day. In the provisions of the Charter, states are treated as neither absolutely sovereign nor as absolutely equal, and a wide range of modern activity is excluded from the sphere of domestic jurisdiction. In those areas and on those matters where sovereignty is not vested in a Member state, the General Assembly acting as the agent of the international community may assert the right to enter the legal vacuum and take a binding decision. The exact delimitation of areas and spheres of activity in which sovereignty no longer remains with individual states will not be attempted here. Decisions in regard to certain territory for which the international community has assumed responsibility may be suggested as one example. It may be noted that it has been in regard to mandated territory that the General Assembly has made its most peremptory recommendations.[1] Certain attributes of sovereignty with regard to the use of armed force have also been surrendered, and while the General Assembly in this field can take no action, i.e. enforcement measures, it may be that it can take legally binding decisions. Finally, it might be argued that the protection of human rights falls or will be brought into a sphere of action where binding resolutions may be made.

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[1] For example, see Art. 19 of the Trusteeship Agreement for the Territory of Togoland under British Administration.

[2] Interpretations of the point in issue made in Sub-Committee 1 of the Fourth Committee were conflicting. See *Official Records of the Second Part of the First Session of the General Assembly, Fourth Committee, Part II* (1946), pp. 85–8, 147–9. Mr. Bailey (Australia) was of the opinion that 'the second party to a dispute would not be obligated by the terms of the Article although the contrary seemed to be implied by the text'.

[3] The fact that the agreement may not in a technical sense be a 'treaty or convention' (see Art. 38 of the Statute of the International Court of Justice) should not be decisive in view of the Court's liberal approach to questions of form.

[4] These principles have particular force with reference to the dictum of the Permanent Court of International Justice in *The Lotus* case that restrictions on the independence of states cannot be presumed (*P.C.I.J.*, Ser. A, No. 10 (1927), p. 18).

Another important function inherent in the position of the General Assembly is the adopting of declaratory resolutions and the giving of opinions. While it must be conceded that the General Assembly cannot enact new law, it has already adopted resolutions, declaring what it finds to be an existing rule of international law. Perhaps the most important of such resolutions have been the affirmation of the Nuremberg principles and the declaration that genocide is an international crime.[2] Professor Philip C. Jessup has written that such declarations 'are persuasive evidence of the existence of the rule of law which they enunciate'.[3] If fifty-eight nations unanimously agree on a statement of existing law it would seem that such a

— or does it exist after the statement?

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[1] Mr. Shertok, representative of the Jewish Agency for Palestine, argued: 'With regard to the status of Assembly resolutions in international law, it was admitted that any which touched the national sovereignty of the Members of the United Nations were mere recommendations and not binding. However, the Palestine resolution was essentially different for it concerned the future of a territory subject to an international trust. Only the United Nations as a whole was competent to determine the future of the territory, and its decision, therefore, had a binding force.' (U.N. Doc. A/C.1/SR.127 (27 April 1948), p. 7). See statement of Acting United Nations Mediator, Bunche, in U.N. Doc. A/C.1/SR.161 (18 October 1948), p. 7. A similar argument was made by the representatives of China, India, and Guatemala with regard to the recommendation on South-West Africa (U.N. Doc. A/C.4/SR.40 (7 October 1948), pp. 4–5). The representative of China observed that 'in a matter which affected a mandated territory South Africa could not claim the right of sovereignty'. See also Benjamin V. Cohen, *N.Y. Herald Tribune*, 17 March 1948, p. 22.

[2] Resolutions 95 (I) and 96 (I), 11 December 1946; Resolutions 177 (II) and 180 (II), 21 November 1947; see also Resolution 103 (I), 19 November 1946. It will be noted that in the Convention on Genocide adopted by the 3rd session of the General Assembly, the contracting parties, having considered the declaration made by the General Assembly, 'confirm' that genocide is a crime under international law (Resolution 260 (III) A, 9 December 1948).

[3] *A Modern Law of Nations* (1948), p. 46.

declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law.[1]

It might even be argued that such a statement was an expression of a 'general principle of law recognized by civilized nations'. In this regard reference should be made to the practice of American states.[2]

B. JURIDICAL CONSEQUENCES OF THE RECOMMENDATION

1. *Recommendation as a basis for enforcement*

As already pointed out, in international law the absence of enforceability is not equivalent to the absence of legal obligation. It has even been suggested that no organ of the United Nations has power to enforce international law;[3] but this suggestion is subject to qualification under

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[1] Art. 23 of the Statute of the International Law Commission provides that the Commission, after it has prepared articles for the codification of particular topics, may recommend to the General Assembly '. . . (*b*) to take note of or adopt the report by resolution . . . '. 'It was generally understood that such adoption does not give to a draft any legal binding force' (Yuen-li Liang, 'The General Assembly and the Progressive Development and Codification of International Law', *A.J.* 42 (1948), p. 87). But just as a draft of the I.L.C. will have value as a restatement of law by an official body of experts, its adoption by the General Assembly will add to its persuasive value. See statements of Belgian and United States representatives in U.N. Doc. A/C.6/SR.58 (21 November 1947), pp. 5–7.

In a Memorandum by the Secretary-General on Reparation for Injuries Incurred in the Service of the United Nations it was stated: 'It would appear that a number of questions of *law*, policy and procedure should be determined by the General Assembly' (U.N. Doc. 674 (7 October 1948), p. 3). *Italics added.* The General Assembly, however, decided to ask an advisory opinion of the International Court of Justice. A few representatives argued that recommendations were not binding, and that therefore a convention should be drawn up. See statements by the representative of Syria (U.N. Docs. A/C.6/SR.112 (20 November 1948), p. 13; SR.116 (22 November 1948), p. 8; SR.117 (24 November 1948), p. 2), and by the representative of Greece (U.N. Doc. A/C.6/SR.112 (20 November 1948), p. 18).

With reference to the Draft Declaration of Human Rights it was suggested by the French representative, M. Cassin, that a resolution of the General Assembly could be considered as an authoritative interpretation of the Charter of the United Nations (U.N. Doc. A/C.3/SR.92 (5 October 1948), pp. 11–12). 'It represented a clarification of the Charter, and was an organic act of the United Nations having all the legal validity of such an act. No one could disregard with impunity the principles it proclaimed' (U.N. Doc. E/SR.215 (25 August 1948), p. 19). But see statements of United Kingdom and New Zealand representatives (U.N. Doc. A/C.3/SR.93 (5 October 1948), p. 2; E/SR.215 (25 August 1948), p. 22).

At San Francisco it was envisaged that the General Assembly should interpret the parts of the Charter applicable to its particular functions. But it was not authorized to give authoritative interpretation binding on other organs (Report of the Rapporteur of Committee IV/2, Doc. 933, IV/2/42 (2), pp. 7–8, *U.N.C.I.O. Documents*, vol. xiii (1945), pp. 709–10; see Pollux, 'The Interpretation of the Charter', this *Year Book*, 23 (1946), pp. 62–3). However, an interpretation given by the most representative organ of the United Nations would have great persuasive value, and within the scope of its activities might have legal force.

[2] In 1945 the American states assembled at the Conference on Problems of War and Peace spoke of incorporating certain principles into their international law since 1890 'by means of conventions, resolutions, and declarations' (Preamble of the Act of Chapultepec). See also Resolution XXIV of the same Conference. See Jessup, *A Modern Law of Nations* (1948), pp. 46–8; Fenwick, *International Law* (1948), pp. 79, 205, 429.

[3] Eagleton, 'Palestine and the Constitutional Law of the United Nations', *A.J.* 42 (1948), p. 398: 'However regrettable it may be, no organ of the United Nations is given power to enforce a rule of law, much less a mere recommendation by the Assembly. Enforcement can only be

Article 94, paragraph 2, of the Charter by which the Security Council is authorized to make recommendations or decide upon measures to give effect to judgments of the International Court of Justice.[1] Nevertheless, while enforcement is not essential to establish binding force in recommendations, it is one of the most important consequences to consider in a discussion of legal obligation.

The General Assembly itself may consider means for implementing its recommendations, and may exert pressure through further recommendations for that purpose.[2] Should it consider that a failure to comply with its recommendation related to the maintenance of international peace and security, it could refer the question to the Security Council for action.[3] But the General Assembly itself has no enforcement powers and, if recommendations are to be enforced by any organ of the United Nations, such enforcement must come from the Security Council. The question of enforcement of General Assembly resolutions has been most thoroughly considered in relation to the Palestine question.

In the partition resolution the General Assembly requested the Security Council to 'consider, if circumstances during the transition period require such consideration, whether the situation in Palestine constitutes a threat to the peace' and to 'determine as a threat to the peace, breach of the peace, or act of aggression, in accordance with Article 39 of the Charter, any attempt to alter by force the settlement envisaged by this resolution'.[4] Senator Austin, United States Delegate to the Security Council at the 253rd meeting on 24 February 1948 stated:

> 'Attempts to frustrate the General Assembly's recommendation by the threat or by incitement to force, on the part of states or people outside Palestine are contrary to the Charter.'[5]

It would seem incontestable that if non-compliance with a General Assembly recommendation manifests itself in a resort to force amounting to a threat to the peace, breach of the peace, or act of aggression, the

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used in the case of a threat to the peace, breach of the peace, or act of aggression.' But see Sharp, 'Death against Life', *University of Chicago Law Review*, 15 (1948), p. 903.

[1] Sloan, 'Enforcement of Arbitral Awards in International Agencies', *The Arbitration Journal*, 3 (1948), pp. 140–6. For an opposite interpretation of Art. 94 see *Hearings before the Committee on Foreign Relations of the United States Senate on the Charter of the United Nations* (1945), pp. 285–7, 331.

[2] Resolution 65 (I) in which the General Assembly recommended that South-West Africa be placed under trusteeship was maintained in subsequent resolutions adopted on 1 November 1947 (Resolution 141 (II)) and 26 November 1948 (Resolution 227 (III)). In its last resolution the General Assembly noted with regret that its previous recommendations had not been carried out.

[3] Art. 11, para. 2. If the General Assembly or the Secretary-General should consider that non-compliance endangered or threatened international peace and security, either could call the attention of the Security Council to the situation. Art. 11, para. 2, and Art. 99.

[4] Resolution 181 (II) (29 November 1947).

[5] U.N. Doc. S/PV.253 (24 February 1948), p. 32. See also S/PV.258 (27 February 1948), pp. 12, 52–5; A/C.1/SR.127 (27 April 1948), p. 4.

Security Council has sufficient authority to take measures to repress such manifestations of non-compliance. It would also appear that the Security Council has authority to continue its enforcement action until a settlement has been achieved which would end the threat to the peace.

Whether, apart from a determination under Article 39, the Security Council might act to implement certain resolutions of the General Assembly is not so easily determined. It was suggested in a memorandum prepared by the United Nations Secretariat and communicated to the Security Council on 5 March 1948 that outside the specific powers conferred in Chapter VII, the Security Council might consider that it has a duty inherent in Article 24 of the Charter to assist substantively in the implementation of a Plan considered by more than two-thirds of the General Assembly as conducive to general welfare or friendly relations among nations.[1] In citing the acceptance of responsibility by the Security Council in regard to the Free Territory of Trieste as a precedent for this interpretation of Article 24, the memorandum continued:

> 'It is submitted that if the Security Council deemed that it was within its competence to accept responsibilities for the carrying out of certain provisions of a treaty negotiated and concluded outside the United Nations, it is still more appropriate that it should accept responsibilities for the implementation of a plan adopted by the General Assembly.'[2]

A different position has been presented by Senator Austin who stated:

> 'The Charter of the United Nations does not empower the Security Council to enforce a political settlement whether it is pursuant to a recommendation of the General Assembly or of the Security Council itself.'[3]

Certain residual powers in relation to the maintenance of international peace and security may be developed by usage from the delegation of responsibility in Article 24, paragraph 1. Such powers would be additional to the specific powers referred to in paragraph 2 of that article. As was pointed out in the Secretariat memorandum, such additional powers were accepted in the case of Trieste where they had been provided for by the Treaty of Peace with Italy. If it is true that legal obligations can be created, not only by treaty, but by certain resolutions of the General Assembly as suggested in section 4 of Part A, *supra*, then it would seem that the Security Council, utilizing residual powers, could assume responsibility for giving effect to such obligations in so far as they relate to the maintenance of peace and security.

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[1] U.N. Doc. A/AC.21/13 (9 February 1948), p. 11: 'An international armed force set up on this basis would not be one in the sense of Chapter VII of the Charter. It would have the character of an international police force for the maintenance of law and order in a territory for which the international society is still responsible.'

[2] Ibid., p. 7. See Benjamin V. Cohen, *N.Y. Herald Tribune*, 16 March 1948, p. 26; 17 March 1948, p. 22.

[3] Op. cit., p. 48. Mr. Lopez (Colombia) also stated: 'The plan is legally unenforceable.' U.N. Doc. S/PV.258 (27 February 1948), p. 47. See Eagleton, *N.Y. Herald Tribune*, 28 March 1948, Section II, p. 7.

2. *Recommendation as a basis for judicial or diplomatic proceedings*

The role which recommendations of the General Assembly are destined to play in judicial proceedings or diplomatic negotiations is one which must be determined by future developments. However there would appear to be no doubt that they will be cited in argument when they support one side or the other. A resolution of the Assembly of the League of Nations of 24 September 1927 and a resolution of the Sixth Pan-American Conference of 18 February 1928 were referred to in the Opinion and Judgment of the Nuremberg Tribunal.[1] The United States Department of Justice in a brief submitted to the Supreme Court of the United States cited General Assembly Resolution 103 (I) of 19 November 1946 as well as resolutions of the Inter-American Conference on Problems of War and Peace held at Mexico City in 1945 and of the Eighth International Conference of American States held at Lima in 1938.[2]

The mere fact that resolutions are cited is perhaps not as significant as the purpose for which they are cited. If they are cited as a basis of a claim of right, such a citation might be a step towards the development of a custom by which a binding force is established. The Nuremberg Tribunal cited the resolutions of the League and of the Pan-American Conference to 'reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal'.[3] The United States Department of Justice cited the Resolution of the General Assembly of the United Nations[4] in support of the proposition that the 'enforcement of racial restrictive covenants is contrary to the public policy of the United States'. In the brief the resolutions appear under the heading of 'International Agreements'.

Those resolutions of the General Assembly which are declaratory of international law may be expected to play an important role in judicial and diplomatic proceedings. They would possess considerable persuasive or evidential value in determining existing law, both as restatements of established rules and indications of trends in development. It is with less confidence that one ventures a prediction as to the influence of other resolutions. It is undoubtedly true, as has been true in the past, that some will be cited as evidence of agreement or consent. Others, it is believed, will be cited as giving rise to binding obligations, and will exercise influence particularly in diplomatic negotiations.

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[1] Opinion and Judgment, United States Government Printing Office (1947), pp. 51–2.

[2] Brief for the United States as *amicus curiae* in Racial Restrictive Covenants cases (*Shelley* v. *Kraemer*; *McGhee* v. *Sipes*; and *Hurd* v. *Hodge*) (1947), pp. 98–100.

[3] Opinion and Judgment, p. 52.

[4] The text of the resolution is: 'The General Assembly declares that it is in the higher interests of Humanity to put an immediate end to religious and so-called racial persecutions and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and to the spirit of the Charter of the United Nations, and to take the most prompt and energetic steps to that end.'

3. *Recommendation as a basis for excusable cessation of performance*

The extent to which a recommendation of the General Assembly may serve as a basis for excusable cessation of performance has particular interest in relation to the subject of treaty revision. A specific reference to treaty revision such as was contained in Article 19 of the Covenant of the League of Nations was not accepted by the San Francisco Conference, but Article 14 of the Charter is sufficiently broad to permit recommendations in this regard.[1]

Although it is to be expected that the General Assembly would ordinarily suggest only that the parties consider revision, it might, in some instances, recommend a change. To what extent could such a recommendation release a state from a treaty obligation? It is submitted that, in the absence of judicial settlement, a recommendation based on the doctrine *rebus sic stantibus* would have sufficient force effectively to release a state from obligations incurred under a treaty. The recommendation would remove the principal objection to unilateral termination under the doctrine *rebus sic stantibus*, that is, the objection that unilateral termination puts the final decision into the hands of the party making the claim.[2]

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If the same dispute, after being the subject of General Assembly recommendation, should later be referred to an international tribunal, the tribunal should give due consideration to a determination by the representative organ of the international community that conditions had so changed since the conclusion of the treaty as to justify cessation of performance. The determination of the application of the doctrine *rebus sic stantibus* is a question which may, in many cases, be more suitably considered by a political than by a judicial organ.

4. *Recommendation as a basis for claim of self-defence*

It has been suggested by some who would seek to expand the concept of self-defence in Article 51 of the Charter, that a recommendation of the General Assembly might serve as a basis for the exercise of the right of self-defence. This position is not justified by the Charter since the only condition in which self-defence is authorized is in case of 'armed attack', and a recommendation made before the event could not be a basis of self-defence in the sense envisaged in Article 51. At the time of an outbreak of hostilities both sides might make the claim that they were resisting an armed attack, and so report to the Security Council. Should the Security Council be unable to take action because of disagreement between the permanent members, a resolution of the General Assembly might play a part in fixing responsibility but would not be the basis for self-defence.

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[1] See Doc. 748, II/2/39, Doc. 771, II/2/41, Doc. 790, II/2/42, *U.N.C.I.O. Documents*, vol. ix (1945), pp. 126–30, 159; Doc. 1151, II/17, *U.N.C.I.O. Documents*, vol. viii (1945), pp. 197, 207, 212; but see ibid., pp. 202, 210, 222.

[2] See comment to Art. 28 of Harvard Research Draft on the Law of Treaties, *A.J.* 29 Supplement (1935), pp. 1125–6. The General Assembly, however, in the absence of a special agreement is probably not a '*competent* international authority' within the definition of the Harvard Research.

5. *Recommendation as a basis for incorporation into municipal law*

General Assembly resolutions do not directly become a part of any national law[1] as do treaties under the supremacy clause of the United States Constitution or as do rules of general international law under the Anglo-American doctrine of incorporation into the common law. Recommendations might be utilized directly by courts as indicated in a preceding section, √ but generally speaking legislation would be necessary to give them effect in municipal law.

Recommendations which require legislation for their implementation should impose an obligation on the part of a Member to give serious consideration to the question of adapting its constitution and laws in order to conform with the recommendations. While there has been only a relatively small amount of legislation thus far enacted as a consequence of General Assembly recommendations, the reports which Members have made concerning the implementation of recommendations on economic and social matters indicate that the question of necessary legislation has been considered and laws adopted.[2]

The Belgian Delegation, in a statement on the legal significance of the draft declaration on Human Rights while it was being considered by the Third Committee of the General Assembly, said:

> 'No Member State, even if it had voted for the declaration, would be legally bound to write into its legislation the principles of the declaration. But it would assume the obligation to take them into consideration. In other words, the recommendation resulting from the work of the Committee would create the beginning of an obligation for the Member States of the United Nations.'[3]

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[1] Doc. 1151, II/17, *U.N.C.I.O. Documents*, vol. viii (1945), p. 208. Mr. Evatt (Australia) stated: 'Of course these recommendations will have no operative effect in any country.'

[2] For example, see U.N. Doc. E/963 (13 August 1948), p. 24; E/963/Add.6 (14 August 1948), p. 8; E/963/Add.7 (16 August 1948), p. 6. With reference to General Assembly Resolution 56 (I) Argentina, Venezuela, and India reported legislative or constitutional action concerning equal political rights for women.

[3] U.N. Doc. A/C.3/SR.108 (22 October 1948), p. 9. Mr. Stephens (Canada) stated: 'Its fine statement of principles would certainly influence the course of legislation in States which considered themselves, or would come to consider themselves, bound by it' (U.N. Doc. E/SR.215 (25 August 1948), p. 25). M. Cassin (France) stated: 'The Declaration was also destined to guide Governments in the determination of their policy and their national legislation' (U.N. Doc. A/C.3/SR.92 (5 October 1948), p. 11).

CONCLUSION

There are circumstances under which a resolution of the General Assembly produces important juridical consequences and possesses binding legal force. As a general rule, however, resolutions, for lack of intention or of mandatory power in the Assembly, do not create binding obligations in positive law. With regard to these resolutions, 'recommendations' within the normal meaning of the word, there remain important problems of status and effect.

Although a large majority supports the view that most recommendations have no *legal force*, the opinion also prevails that General Assembly recommendations possess *moral force* and should, as such, exert great influence. Representatives in describing the effect of General Assembly recommendations have used such phrases as 'moral force',[1] 'moral authority',[2] 'moral weight',[3] 'moral power',[4] 'moral judgment',[5] 'moral obligation',[6] and 'morally binding'.[7] The Secretary of State for Foreign Affairs of the United Kingdom in 1945 when reporting to Parliament on the Charter of the United Nations predicted that the General Assembly would become a great instrument for the forming of world opinion which it would be 'perilous for any state to ignore'.[8]

The exact nature of this moral force is not easy to define. Although it is true that the early hopes in regard to Assembly recommendations have not been immediately realized, the view that the expression 'moral force' has no positive content and is merely a diplomatic way of indicating that there is no legal, i.e. binding, force cannot be accepted. It was argued by Mr. Lawrence, representative of South Africa in the Fourth Committee of the General Assembly, that 'to go into questions of moral obligation was to enter upon the quicksands of unqualified rules of conduct for the determination of which there was as yet no international tribunal'.[1] But Mr. Dulles, representative of the United States, contended that 'the General Assembly served as the Town Meeting of the World and it was within its competence to make recommendations which reflected the moral judgment of the conscience of the world'.[2]

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[1] U.S.S.R., U.N. Doc. A/C.3/SR.102 (15 October 1948), p. 12; France and United States, U.N. Doc. A/422 (27 October 1947), p. 3; Chile, U.N. Doc. E/SR.218 (28 August 1948), p. 3; Netherlands, U.N. Doc. A/C.4/SR.38 (7 October 1947), p. 8; Denmark, U.N. Doc. A/PV.104 (1 November 1947), p. 56. See statement of the Secretary-General, U.N. Doc. A/PV.128 (29 November 1947), pp. 147–50.

[2] United Kingdom, U.N. Doc. A/C.3/SR.93 (5 October 1948), p. 2; United States, U.N. Doc. A/PV.110 (13 November 1947), pp. 32–5, 37.

[3] France, U.N. Doc. A/C.4/SR.32 (26 September 1947), p. 4.

[4] France and United States, U.N. Doc. A/422 (27 October 1947), p. 3.

[5] United States, U.N. Doc. A/C.4/SR.38 (7 October 1947), p. 6.

[6] Pakistan, U.N. Doc. A/C.4/SR.39 (8 October 1947), p. 2; see U.N. Doc. A/648 (Part one) (18 September 1948), p. 5.

[7] India, U.N. Doc. A/C.4/SR.31 (25 September 1947), p. 3. See Progress Report of United Nations Mediator for Palestine, U.N. Doc. A/648 (Part one) (18 September 1948), p. 5. Representatives of Poland have expressed the opinion that General Assembly resolutions are binding and that the 'authority of the United Nations demands the most scrupulous execution of its decisions' (U.N. Docs. A/C.1/SR.127 (27 April 1948), p. 2 and A/PV.139 (23 September 1948), p. 41).

Mr. Lawrence (South Africa) denied that a General Assembly resolution could create an obligation either legal or moral. U.N. Doc. A/PV.105 (1 November 1947), p. 196. Mr. Vyshinsky (U.S.S.R.) has stated that certain resolutions, which in his opinion violated the letter or the spirit of the Charter, had no moral force (U.N. Doc. A/PV.110 (13 November 1947), pp. 81–2). See U.N. Docs. A/C.4/SR.31 (25 September 1947), p. 3; A/PV.104 (1 November 1947), p. 56.

[8] *A Commentary on the Charter of the United Nations*, Cmd. 6666 (1945), p. 17. See *Report to the President on the Results of the San Francisco Conference*, Department of State Publication 2349 (1945), p. 54; Eagleton, *International Government* (1948), p. 323; Sir Charles Webster, 'The United Nations Reviewed', *International Conciliation*, No. 443 (1948), p. 446.

Various reasons have been advanced to explain why General Assembly recommendations should exert great influence. Emphasis has been placed on the fact that the recommendation represents the will of the majority of nations[3] and is an expression of world opinion.[4] Public opinion, which is thus put forth as a principal force supporting recommendations of the General Assembly, has also been suggested by some as the leading force supporting obligations established by international law.[5] In the marshalling of world opinion recommendations of the Assembly enjoy an advantage because of the opportunity, which is not always available in the sphere of international law, for full publicity and for a recorded vote.[6] The force of a recommendation is not derived from a judgment made in an internal court of conscience, but from a judgment made by an organ of the world community and supported by many of the same considerations which support positive international law. The judgment by the General Assembly as a collective world conscience is itself a force external to the individual conscience of any given state. It is submitted that in view of these considerations the 'moral force' of the General Assembly is in fact a nascent legal force which may enjoy, in the rounded words of Justice Cardozo, a twilight existence hardly distinguishable from morality or justice until the time when the *imprimatur* of the world community will attest its jural quality.[1]

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[1] U.N. Doc. A/C.4/SR.38 (7 October 1947), p. 5.

[2] Ibid., p. 6. See Mr. Romulo (Philippines), U.N. Doc. A/C.4/SR.39 (8 October 1947), p. 5. It may be noted that Art. 227 of the Treaty of Versailles called for a tribunal to vindicate 'the validity of international morality'. But the Opinion and Judgment of the Nuremberg Tribunal, p. 153, stated that the Nuremberg Charter did not make criminal an offence 'against political morality'.

[3] See representative of Haiti, U.N. Doc. A/C.4/SR.79 (12 November 1948), p. 3; Progress Report of the United Nations Mediator on Palestine, U.N. Doc. A/648 (Part one) (18 September 1948), p. 5. The size of the majority has been suggested as a measure of the moral force of recommendations of the Assembly of the League of Nations and of resolutions of The Hague Peace Conferences. See Burton, *The Assembly of the League of Nations* (1941), p. 187; Riches, *The Unanimity Rule and the League of Nations* (1933), p. 104; Scott, *The Hague Peace Conferences*, vol. i (1909), p. 36.

[4] See Mr. Dulles (U.S.), U.N. Doc. A/PV.110 (13 November 1947), pp. 32–5; *A Commentary on the Charter of the United Nations*, Cmd. 6666 (1945), p. 17; Eagleton, *International Government* (1948), p. 323. Dr. Koo (China), Doc. 1151, II/17, p. 14, *U.N.C.I.O. Documents*, vol. viii (1945), p. 203.

[5] Root, 'The Sanctions of International Law', *A.J.* 2 (1908), p. 453; Fenwick, *Cases on International Law* (1935), p. 20; Gray, *The Nature and Sources of Law* (1909), No. 285.

[6] See Sloan, 'Comparative International and Municipal Law Sanctions', *Nebraska Law Review*, 27 (1947), pp. 9–10.

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[1] See *New Jersey* v. *Delaware* (1933), 291 U.S. 383; 'International Law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality.' Cf. Fenwick, *International Law* (1948), p. 429. In some instances 'moral obligations' that are determinable outside of the conscience have developed into legal obligations, as in the case of executive agreements. In others, such as the alleged obligation to ratify treaties duly signed, they have tended to disappear. See Wilcox, *The Ratification of International Conventions* (1935), pp. 101–5, 231. Advisory opinions of the International Court of Justice have also been characterized as having a 'moral force' or 'moral value'. See Hudson, *The Permanent Court of International Justice 1920–1942* (1943), p. 512; U.N. Doc. A/C.6/SR.124 (27 November 1948), p. 4. See *supra*, Part A, Sec. 3.

LEGAL ASPECTS OF STATE TRADING

By J. E. S. FAWCETT, M.A.

I

1. STATE trading, the purchase or sale of goods for import or export, or the supply of commercial services, by the state, is now an established practice in many countries, and since it is hotly debated by political economists whether it is the salvation or last infirmity of those countries, it may be useful to see how it stands in law. We must first mark out the boundaries of discussion. State trading contracts are only one class of state contracts, and within that class the discussion will be limited to state trading across frontiers, that is, to its international aspects. Much has been said in the courts and much written in the books about state loan contracts and the public debt liability of the state to foreign creditors;[1] about agreements for the acquisition of rights in land by the state; and about the immunity of states, in respect of their contractual obligations, from the jurisdiction of national courts and even from diplomatic process, and these matters will only be referred to by the way. But it must be said here that the fact that a state may be immune from the jurisdiction of national courts does not necessarily imply that these 'contractual obligations' are not obligations and not contractual. Chief Justice Hughes, in a leading case[2] in the United States Supreme Court on the character of sovereignty, pointed out that the United States may not be sued without its consent, but that this was a question of procedure which did not affect the legal and binding character of the obligations assumed by it. The answer to this preliminary question of procedure has often brought cases, in which a state has been invoked as a party, to an early conclusion, and the character of the state's obligations, which would have been in issue had the case proceeded, has been given scant study in the courts; a belief has even grown up that all transactions of the state which are contractual in form are in fact acts of sovereignty and create no legal obligations at all.

The purpose of this article, then, is to take examples of state trading and discover in what capacity the state engages in foreign trade;[3] to suggest that state trading normally gives rise to contractual obligations, whether the interested parties are a state and a private person, or two states; to find how the proper law of a state trading contract is to be determined; and finally, to suggest that the jurisdictional immunities of states engaging in foreign trade should be modified by international agreement.

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[1] See a stimulating article by Dr. F. A. Mann, 'The Law Governing State Contracts', in this *Year Book*, 21 (1944), pp. 11–33, which is largely concerned with loan contracts but has many original and constructive suggestions on state contracts generally.

[2] *Perry* v. *United States of America* (1934), 294 U.S. 330.

[3] 'In private trading business', 'commercial transactions', and 'the ordinary course of business' are other equivalent expressions which have been used by the courts. For simplicity's sake, a state engaging in foreign trade, even though it may be limited to a single transaction, will be called a state trader in this article.

II

2. The various distinctions made between acts *jure imperii* (*actes de puissance publique*) and acts *jure gestionis* (*actes de gestion*), sovereign acts and non-sovereign acts, and the public and the private capacity of the state, are not adequate for classifying state trading contracts, for the lines of demarcation between the political and economic activities of the state have become blurred and it is in this borderland that state trading flourishes. These simple and symmetrical distinctions do not take account of a number of difficulties. First, imperium denotes legal capacity, under constitutional or international law, to perform an act of state or conclude an international agreement; but the performance of a non-sovereign act, *jure gestionis*, may also be in the exercise of a public function. The legal capacity of the state must be separated in thought from its functions, public or private. Secondly, there is the problem of the agency through which the state acts; the Crown may conclude a contract through the agency of a minister, while a similar contract may be concluded by a statutory corporation, which is a state monopoly: is the one act sovereign and the other non-sovereign, or is there no difference between them? Thirdly, while there are some acts of the state, such as the conclusion of a treaty of alliance, which are beyond question sovereign and public, and other acts, such as engaging in the shipping business, which may be regarded as non-sovereign and private, there is a large and growing number of mixed acts which need new classification. Finally, the English and United States courts at least have not given any clear decisions on how the distinctions might be applied, their inclination in recent times being to disregard them altogether.[1]

The various types of state trader now operating in the United Kingdom will now be briefly described.

3. Certain statutory boards or corporations under ministerial control have been created in the United Kingdom since 1945 to operate various industries and services. Thus the National Coal Board, set up by the Coal Industry Nationalisation Act, 1946, s. 1, is a body corporate with perpetual succession and power to hold land without licence in mortmain. British European Airways Corporation and British South American Airways are statutory corporations created by the Civil Aviation Act,

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[1] A concise survey, by W. T. R. Fox, of the attitude of the United States and English courts to some of these distinctions is to be found in *A.J.* 35 (1941), at p. 632.

1946, and British Overseas Airways Corporation is assimilated to them by that Act. An important characteristic of these bodies is their relationship to the Minister of Fuel and Power and to the Minister of Civil Aviation respectively, which will be adverted to later. For the moment, it is sufficient to point out that they do not need or possess a monopoly of the import of particular goods and materials; nevertheless they are bound to make isolated or continuous purchases abroad of machinery, goods, and materials for the use of the nationalized industry or service for which they are responsible; to this extent they are or may become state traders, within the rough definition with which we must work for the moment.

The most active state traders, however, in the United Kingdom are two Ministers of the Crown, the Minister of Food and the Minister of Supply, who have monopoly powers as the sole importers of certain products. The Minister of Food[1] has not, it appears, been declared to be a corporation sole, capable of suing and being sued, and, within his sphere of responsibility, he presumably exercises the general executive authority of the Crown. The Ministry of Food has concluded a number or long-term or bulk-purchase contracts with other governments in the Commonwealth, as well as food purchase contracts with foreign private traders; the greater portion of the United Kingdom's wheat requirements are met by a long-term contract with Canada which runs until 1950. Long-term contracts for the purchase of meat have also been concluded with Australia, New Zealand, and the Argentine,[2] prices being subject to review every two years. The Ministry of Supply is similarly the sole importer of certain raw materials, while the Board of Trade is a large buyer of sisal, hides, and skins from the colonies.[3]

Another type of state trader is the Raw Cotton Commission, established by the Cotton (Centralized Buying) Act, 1947; it is a monopoly not subject to direct ministerial control, which procures raw cotton through its purchasing agents abroad and imports it into the United Kingdom for sale to the cotton industry.

Cable and Wireless Limited is a company operating overseas telecommunication services as a monopoly; H.M. Treasury acquired all the stock under the Cable and Wireless Act, 1946, but its directors are responsible, as in any other company, for its policy and operations and are free of ministerial control, and it should be probably regarded as a variant of the statutory board or commission.

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[1] The Ministry of Food was put on a permanent basis by the Ministers of the Crown (Transfer of Functions) Act, 1946, s. 4, and its First Schedule, which in part reproduces the Ministers of the Crown (Emergency Appointments) Act, 1939, ss. 1–4.

[2] These contracts perform in part the function of the International Beef Conference, a commodity control system set up in 1937 for beef, including live cattle ready for slaughter, by Argentina, Australia, Brazil, Eire, New Zealand, the United Kingdom, and Uruguay.

[3] Cmd. 7167: *The Colonial Empire (1939–1947)*, chap. iv (*d*).

Examples of state trading through an export monopoly are to be found in the collective marketing boards to be established by legislation in Nigeria and the Gold Coast for the West African cocoa industry. One of its principal purposes is to improve the bargaining position of the individual cocoa producer, which has hitherto been weak in the face of strong cocoa buyers' associations. Similar marketing arrangements are planned for other agricultural products in West and East Africa, Uganda, and Nyasaland, and for bananas in Jamaica.[1]

The interesting case of a limited company, organized in the normal way but having some of the characteristics of a state trader, is United Kingdom–Dominion Wool Disposals Limited. Its main task was to be the liquidation through commercial channels of stocks of wool, acquired during the war by the United Kingdom and other members of the Commonwealth, who joined in organizing the company. This task was to be carried out by the company fixing the total quantities of wool to be offered for sale from time to time concurrently in the Commonwealth or elsewhere; preparing schedules of reserve prices at which the company would itself be willing to purchase new wool; and holding and disposing of the stocks of wool as the agent of the governments concerned.

While we must postpone for consideration below the question of how state trading transactions are to be more exactly classified, it appears that in the United Kingdom and as understood in ordinary commercial usage they fall into three main groups: those carried on by Ministers of the Crown in the exercise of their general executive powers; those carried on by statutory boards or corporations which are under ministerial control but do not always or necessarily act as ministerial agents; those carried on by statutory boards or corporations or limited companies, which are not under ministerial control, but which act as governmental agents.

It is upon these lines of demarcation that the question of classification of state trading transactions will be tackled.

4. The term 'classification' has been chosen because what is being attempted is not a definition of state trading, even if that were possible, but something analogous to classification or characterization in the conflict of laws. If the Minister of Supply purchases copper in Northern Rhodesia or the National Coal Board purchases pit props from Sweden, the question arises: To what legal category, if any, must the transaction be assigned? In the agreement for purchase and sale it can hardly be denied that there are some of the elements of a contract according to 'the general principles of law recognized by civilized nations'. But is there an intention to create legal obligations, an element which would be regarded as essential at any rate in the English courts; and without the

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[1] Cmd. 7167: *The Colonial Empire* (1939–1947), chap. iv (*d*).

presence of which it would be difficult to classify the transaction as a contract? The English, continental, and United States courts have approached this question indirectly and, though it is seldom brought into the open, it is implicit in many decisions. The decisions may be grouped into three classes: those which answer the question in terms of
1 the doctrine of the jurisdictional immunity of states; those which answer
2 it by considering the function which the state was exercising in entering
3 into the transaction; and those which look at the purpose of the transaction.

5. The Drago doctrine, that the creation of state debt is a discretionary act of unlimited sovereignty, is an extreme form of the view, from which the principle of absolute jurisdictional immunity also springs, that the transactions between a sovereign state and an individual are above the law. The English and American courts do not go so far as this; while not attempting to draw any distinction between sovereign and non-sovereign acts, and granting a wide immunity[1] from their jurisdiction, they do not deny that state transactions may be contracts. In *Duff Development Company* v. *The Government of Kelantan*,[2] the plaintiff Company had been granted a mining concession by a deed which contained an arbitration clause incorporating the Arbitration Act, 1889, which provides that arbitral decisions may in certain circumstances be reviewed by the courts. Lord Cave and Lord Dunedin[3] both treated the deed as having created legal obligations, but they did not state on what grounds they held this and they declared that the arbitration clause was an agreement to submit to the jurisdiction of the English courts which could not be enforced. Further, the mere fact that a state has entered into what is in form a private contract will not be taken as being of itself a voluntary submission to the local jurisdiction; but it is not to be inferred from this that there is a presumption that a state which enters into such a contract does not intend to create legal obligations; the principles expounded in the decisions of the courts on state immunity[4] are procedural only. The substantive law was declared in *Rex* v. *International Trustee for Foreign Bondholders* by Lord Atkin, when he said:

> 'It cannot be disputed that a government may expressly agree to be bound by a

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[1] *The Porto Alexandre* [1921] P., *per* Scrutton L.J.: 'There are no limits to the immunity which the sovereign enjoys. . . . It has been held in the Parlement Belge that trading on the part of the sovereign does not subject him to any liability [*sic*] to the jurisdiction.'

[2] [1924] A.C. 797.

[3] *Per* Lord Dunedin: 'He (the respondent) has broken his contract, but the court has no jurisdiction to enforce any performance of it.'

[4] See Fitzmaurice, 'State Immunity in Foreign Courts', in this *Year Book*, 14 (1933), p. 101, in which there is a very lucid statement of the attitudes to state immunity in the courts of various countries. He concludes that the arguments in favour of maintaining complete immunity should prevail.

foreign law. It seems to me equally indisputable that without any expressed intention the inference that a government so intended may be necessarily inferred from the circumstances; as where a government enters into a contract in a foreign country for the purchase of land situate in that country in the terms appropriate only to the law of that country; or enters into a contract of affreightment with the owners of a foreign ship on the terms expressed in a foreign bill of lading; or employs in a foreign country labour in circumstances to which labour laws would apply.'[1]

6. The courts in several countries have turned to consider the capacity in which the state trader was acting, in order to decide whether it intended to be bound by the same legal rules as a private person, that is to say, whether it was acting in a non-sovereign or private character. In England we may first consider some early decisions on the activities of the East India Company, to which Dr. Mann has drawn attention,[2] and which show that in certain cases the courts were prepared to accept and apply the distinction between the political and trading character of a state. The powers of the East India Company were conferred upon it by its charter and by statute:

> 'The East India Company has been invested with powers and privileges of a twofold nature, perfectly distinct from each other—namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India) power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India.'[3]

In *Gibson*'s case the power to maintain armed forces was assumed to give power to make a discretionary grant of pension rights to their officers. The grant was an act similar to an act under the prerogative: it therefore appeared to the court 'to range itself under that class of obligations which is described by jurists as imperfect . . . to be a grant which the company is bound in foro conscientiae to make good, but of which the performance is to be sought for by petition, memorial or remonstrance, not by action in a court of law'. The political powers of the Company were stressed in decisions which described it as 'a Trustee of the British government',[4] and 'as an independent state'.[5] On the other hand, the

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[1] [1937] A.C. 500.

[2] 'The Law Governing State Contracts', in this *Year Book*, 21 (1944).

[3] *Per* Tindal C.J. in *Gibson* v. *East India Co.* (1839), 5 Bing. N.C. 273: the court held that a resolution by the governors of the Company granting pensions upon retirement to its military officers was 'a contract made by the governors in their political character and not in their trading character as merchants', but was not to be regarded as a separate contract with any individual officer.

[4] *Doss* v. *Secretary of State for India in Council* (1875), 19 Eq. 533 (annexation of Oudh by the Company as agent of the Crown); cf. *Kamachee Boye Sahaba* v. *Secretary of State in Council* (1859), 13 Moo. P.C.C. 22 (claim of the eldest widow of the Rajah of Tranjore, in the Presidency of Madras, to inherit his personal estate upon his death intestate, defeated by seizure of the Raj and its property by the Company as 'an exercise of sovereign power').

[5] *Nabob of the Carnatic* v. *East India Co.* (1793), 2 Ves. Jun. 56 (interpretation of three treaties between the Company and the Nabob).

Company was also capable of concluding private law contracts, but the courts did not make clear what was the differentia of a private contract. So in *Moodalay* v. *East India Co.*[1] the Company granted a licence to the plaintiff to sell tobacco and was held liable upon it as 'a private company which had entered into a private contract'. Contracts concluded by the Company in the way of trade were therefore subject to private law and enforceable in the courts.

The special character of these early decisions on the East India Company arising from the charter and statutes establishing the Company is shown by the fact that the English courts have not sought to maintain the distinction between the political and trading character of the state, at least in the cases of a foreign government,[2] and of contracts entered into by a servant or agent of the Crown in that capacity.[3] As to the meaning of servant or agent of the Crown, the English courts have not pronounced very clearly. But it appears that any department of state and any incorporated or statutory body,[4] which by origin or by the functions it has acquired is 'an emanation of the Crown'[5] is to be regarded as *ipso facto* an agent or servant of the Crown; and an incorporated or statutory body may, of course, though not itself 'an emanation of the Crown', conclude a contract as agent of the Crown and so be clothed with its sovereign character.[6]

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[1] (1785), 1 Bro. Ch. C. 469.

[2] *Baroda State Railways* v. *Hafiz Habib-ul-Haq*, Indian Appeals (1937–8), vol. lxv, p. 182; *Annual Digest and Reports of Public International Law Cases*, 1938–40, Case No. 78: a contract was concluded with the respondent for the delivery of railway sleepers to the Baroda State Railways, which were wholly owned by the Gaekwar and managed by his servants; they alleged that the sleepers delivered were not in accord with contract specifications and repudiated the contract. The respondent sued and upon appeal the Privy Council held that the suit lay in reality against the Gaekwar, who was a foreign sovereign (*Statham* v. *Statham and Gaekwar of Baroda* [1912] P. 92) and had not waived his immunity in accordance with the relevant provisions of the Indian Code of Civil Procedure.

But Parliament has taken a rather different view: see the Finance Act, 1925, s. 25: 'the government of any part of H.M. dominions (including territory under protection or mandate)' shall be liable to United Kingdom taxation 'in respect of any trading operations carried on in the United Kingdom.'

[3] *Macbeath* v. *Haldimand* (1786), 1 T.R. 172: contract for the supply by the plaintiff of military stores to a fort in Quebec; the defendant, who was an army officer deputed to act as agent for the Governor of Quebec, was held not liable on the contract.

[4] There is a presumption that an incorporated or statutory body has the same rights and liabilities as a private person: *In re Wood's Estate* (1886), 31 Ch.D. 607.

[5] Language of Day J. in *Gilbert* v. *Corporation of Trinity House* (1886), 17 Q.B.D. 795.

[6] *Graham* v. *Public Works Commissioners* [1910], 2 K.B. 781. *Per* Phillimore J.: The fact that the commissioners were incorporated without reservation 'confers, it seems to me, the privilege of suing and the liability to be sued' (see *supra*, n. 4). But he went on to say: 'For facilitating the conduct of business it is extremely convenient that the Crown should establish officials and corporations, who can speedily sue and be sued in respect of business engagements, without the formalities of the procedure necessary when a subject is seeking redress from his sovereign. . . . But no execution can go against them because their property, if they have any . . . is Crown property.' The conclusion seems anything but convenient, and this view overlooks the fact that the presumption of private liability may be rebutted by showing that the body concerned was in general or in the particular case an agent of the Crown: see *Rowland* v. *Air Council* (1923),

The principle that a state may assume a private character and carry on activities proper to a private person has been recognized by the United States Supreme Court in two circumstances: where these activities would, if carried on by a private person, attract taxation; and where the activities of the state are carried on through an independent corporation. In the first case, the scope of the decisions is limited by the fact that the Court was concerned with the special relationship between the states of the Union and the Federal Government with respect to taxation.[1] In *South Carolina* v. *United States of America*[2] that state had adopted a law by which no liquor was allowed to be imported for sale except such liquor as might be bought by a state-appointed board and sold by state dispensers appointed under statutory regulations. The Federal collector of internal revenue demanded payment of taxes upon their licences from the dispensers. The Court of Claims held that, where a state of the Union unites in one undertaking an exercise of the police power (control of the import and consumption of liquor) with a commercial business (the securing to the state of the profits from liquor import and consumption), the Federal Government cannot be required to lend its support to the former at the cost of foregoing its constitutional right[3] to lay and collect taxes on the latter. The majority[4] of the Supreme Court upheld this opinion, saying: 'The exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by a State in the carrying on of an ordinary private business.' An even stronger decision, discriminating between the functions of a state, was *Collector of Internal Revenue* v. *Regents of the University System of Georgia*,[5] where it was held that a state of the Union which engages in business is not relieved of the duty to pay taxes on the income from it, even though it is being carried on solely in the public interest; the assumption of a private character prevails.

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39 T.L.R. 228; the Air Force (Constitution) Act, 1917, s. 10 (1), provided that 'the Air Council may sue and be sued', but it was held in that case that this did not mean that an action will lie on a contract made by its members on behalf of the Crown.

[1] Art. I, Sec. VIII (1), of the United States Constitution provides: 'The Congress shall have power to lay and collect taxes, duties, imports and excise, to pay the debts and provide for the common defense and general welfare of the United States.'

[2] (1905), 199 U.S. 437.

[3] Art. I, Sec. VIII (1), of the United States Constitution.

[4] The minority considered that the state control of liquor was wholly a governmental function and that the incidental profits were not therefore liable to federal taxation.

[5] (1938), 304 U.S. 439: football matches were held in a university stadium and admission fees were charged and applied solely to repay a loan raised to build the stadium. The Supreme Court held that the admission fees were subject to federal tax: 'If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative and judicial branches, it does not follow that, if the State elects to provide the funds for any of these purposes by conducting a business, the application of the avails in aid of necessary governmental functions withdraws the business from the field of Federal taxation.'

The United States courts have also consistently treated corporations, organized under municipal law whether in the United States or abroad, as legal entities distinct from the state even though largely owned or controlled by it. The principle underlying this view is that the corporation must be treated as separate from the stockholders, even if a state is one of these stockholders or the controlling stockholder,[1] and as the legal owner of the corporate funds.[2] But where such a trading corporation is directed to act as agent of a government, the position may be different, though in a leading authority on the point[3] the distinction drawn between the state 'doing business through the corporation' and the corporation acting 'as agent for the State' is admittedly a fine one.

In a number of decisions courts on the continent of Europe have recognized a private business function of the state,[4] but those which involved the Soviet Trade Delegations must be considered in the light of the facts that the Commissariat of Foreign Trade possessed a monopoly of the foreign trade of the Soviet Union and that the status of its agents, the Soviet Trade Delegations in other countries, was defined by international agreements.

7. The attempt to discriminate between transactions entered into by public authorities, according to their purpose, has not been taken very far either in the English or the United States courts. In *Mersey Docks Trustees* v. *Cameron*,[5] the trustees were held liable to pay rates upon their occupancy of the harbour works on the ground that this was not devoted

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[1] Chief Justice Marshall, considering the position of the state of Georgia as stockholder in a private bank, said: 'When a government becomes a partner in a trading company, it divests itself so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. . . . As a member of a corporation, a government never exercises its sovereignty.'

[2] *Hannes* v. *Roumania Monopolies Institute* (Supreme Court of New York), *Annual Digest*, 1935–7, Case No. 72; where the Roumanian Government was the sole stockholder in and operator of the corporation, the latter could be properly made defendant. Cf. Hackworth, *Digest of International Law*, vol. ii, p. 260, for a similar attitude taken by the United States Treasury in a matter concerning the Nicaraguan State Railways, which were incorporated in Maine: cf. *Annual Digest*, 1935–7, Case No. 74.

[3] *Coale* v. *S.C. Suisse des Charbons* (1921), Fed. (2d) 180. *Per* Judge Augustus Hand: 'If the Swiss government chose to do its business by means of the [defendant] Société, the latter, as a corporate entity, was liable for its corporate obligations. . . . If the Société had contracted as agent for the Swiss government, the case might have been different.' See also *New York* v. *United States of America* (1946), cited in *A.J.* 40 (1946), p. 374, and *Soviet Trade Delegation* v. *Paulin*, *Annual Digest*, 1935–7, Case No. 96, a decision in an Estonian court which held the plaintiff to have contracted in its own name, and therefore not as agent of the U.S.S.R., for the hire of a ship.

[4] E.g., *Téfimo Company* v. *Soviet Trade Delegation* (Court of Appeal of Paris), *Annual Digest*, 1933–4, Case No. 6. Cf. ibid., 1927–8, Case No. 15, commercial representative of the U.S.S.R. required to register in France as a *commerçant*; *Stato di Rumania* v. *Trutta* (Court of Cassation, Italy) (1926), cited in *A.J.* 35 (1941), p. 638: an Italian national contracted with the Roumanian Government for supplies to the Roumanian army. The Court held that the Roumanian Government had assumed the character of a private trader: 'Such purpose [national defence] does not alter the nature of the contract of purchase, inasmuch as means were employed for its realization, which were extraneous to the exercise of sovereignty.' Cf. *Collector of Internal Revenue* v. *Regents of University System of Georgia*, cited above.

[5] (1864), 11 H.L.C. 443.

to public purposes.[1] The Court contrasted the Post Office, which occupies land and buildings for purposes which are 'public purposes of that kind, which by the constitution of this country fall within the province of government, and are committed to the sovereign, so that the occupiers, though not perhaps strictly servants of the Crown, might be considered in consimili casu'. But the courts have not been satisfied with this separation of public from governmental purposes, owing to the great difficulty of defining the scope of 'public purposes'. Limitation of the authority to a particular locality, and the multiplicity, or the nation-wide character of the duties,[2] of the agency in question, have all been rejected as decisive tests. The United States Supreme Court in *The Pesaro*[3] carried the idea of public purpose to a point where it ceases to have any value as a test for discriminating between State transactions or, indeed, to have any meaning at all: 'The principles of immunity', they held, 'are applicable to all ships held and used by a government for a public purpose. . . . We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.'[4]

8. Bearing in mind the basic principles expressed in these often divergent decisions, we may now venture to classify state trading transactions on the part of the United Kingdom in the following way. The first question to consider is the status of the trading agency:

(*a*) if the state trader is a Minister of the Crown, or a department of the Government which has by statute or otherwise assumed certain functions of the Crown, or any other body or person acting as an agent of the Crown, immunity may be claimed from the jurisdiction of foreign courts, but it is not to be inferred that there was no intention to create legal obligations;

(*b*) if the state trader is a statutory corporation or other body acting in that particular case or in general under direct ministerial control or otherwise as an agent of the Crown, the same considerations apply as in (*a*) above;

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[1] So in *Tyne Improvement Commissioners* v. *Chirton*, 1 E. & E. 516, Campbell L.C.J. said: 'The persons using them [viz., the docks controlled by the Commissioners] are only a particular section of the public and the purposes of the occupation and the applications of the funds cannot therefore be considered as exclusively public in such a sense as to exempt the occupiers from rateability.'

[2] *Gilbert* v. *Corporation of Trinity House* (1886), 17 Q.B.D. 795.

[3] (1926), 271 U.S. 562: in this case the ship was owned by the Italian Government, in its possession and manned by a civilian crew; it was engaged in commercial trade under the direction of the Ministry for Railway and Maritime Transport; under Italian law government-owned vessels were liable to arrest, under the same conditions as vessels in private ownership, whether they were Italian or foreign.

[4] Justice Mack observed in this case: 'It is doubtful whether any activity of the State may properly be called private.'

(*c*) if the state trader is a statutory corporation or other body acting in its own behalf, it is to be treated in all respects as a private trader with regard to the transaction.

The second question, the answer to which will determine whether in fact the state trader intended that the transaction should constitute a contract between the parties, is not: What is the purpose of the transaction? but, What is the form and subject-matter of the transaction?

Where, therefore, a trading transaction is entered into by any of the kinds of state trader described in paragraphs (*a*), (*b*), and (*c*), in a form and involving a subject-matter which would as between private persons create contractual obligations, it may be regarded as a contract.

III

9. If it is found that the status of the state trader or the form or subject-matter of the transaction is such that there cannot have been any intention to create a binding contract,[1] that is legally the end of the matter. But where there is such intention in a transaction entered into, for example, by a state trader of the United Kingdom, the question arises: What law governs the various elements of the contract?

The parties may express a choice of law and, for example, in most contracts concluded by the Minister of Supply in the United Kingdom it is expressly stated that English law governs its interpretation. Again, in the case of an inter-state contract, they may submit it to the jurisdiction of the International Court of Justice so as to make applicable Article 38 of the Statute of the Court.[2] So in a contract of loan between certain Dutch bankers and the French Government, made in 1934, 'L'État français accepte de soumettre tous différends auxquels le présent Bon de Trésor donnerait lieu à la juridiction de la Cour Permanente de Justice Internationale de la Haye'; this and similar provisions might be interpreted as meaning either that cases of default or breach of the contract or the interpretation of the contract as a whole was governed by the law to be applied by the International Court.[3] It should also be noted that where a state trader submits, by waiver of immunity, if enjoyed, or under international agreement, to the jurisdiction of a national court in a case where a contract to which he is a party is in issue, it does not follow that the *lex fori* is the law which governs all or any of the elements of the contract.

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[1] These questions must presumably be answered in terms of the *lex domicilii*, in respect of the status of the state trader, and of the *lex loci contractus*, both being defined by the *lex fori*.

[2] The Brussels Treaty signed on 17 March 1948 provides in Art. VIII that 'The high contracting parties will, while the present treaty remains in force, settle all disputes falling within the scope of Article 36 (2) of the Statute of the International Court of Justice by referring them to the Court, subject only in the case of each of them to any reservation already made by that party when accepting this clause for compulsory jurisdiction to the extent that that party may maintain the reservation'. It seems to follow from this that where a state trading contract concluded between two of the parties does not provide for another mode of settlement of disputes arising out of its execution or interpretation, the International Court will be seized of it.

[3] Dr. F. A. Mann (in this *Year Book*, 21 (1944), p. 19) suggests that the mere fact that one party at least is a state agency tends to 'internationalize' the contract: 'If one party to a contract is an international person, particularly a state, there exists ipso facto a sufficient connection with supranational rules of law which, on any view of the proper law theory, may enable and justify

10. Where the parties do not express a choice of law, the applicable law will depend upon whether we have to do with an inter-state contract or a contract between a state trader and a private person, whether individual or company. The Draft International Wheat Agreement[1] is an interesting example of the first class. It was signed by nearly fifty countries in March 1948 but has not yet entered into force. It is a multilateral global contract for the purchase and sale of wheat. In the draft agreement the 'contracting parties' are divided into two groups: the exporting countries (Canada, Australia, and the United States of America) and forty-odd importing countries, of which the largest importer of wheat is the United Kingdom. The obligations under the agreement are limited to 'guaranteed purchases' of wheat by the importing countries, and 'guaranteed sales' by the exporting countries within certain ranges of quality and price fixed by the agreement. The extent to which these obligations have been fulfilled, action to be taken in case of impossibility of performance by one or more 'contracting parties', and all disputes, are to be determined by the Wheat Council, a body established by the agreement, on which all the 'contracting parties' are represented and each of the two groups of countries has a thousand votes. This agreement, it is suggested, has two aspects: the intergovernmental undertakings and the particular commercial transactions for the purchase and sale of wheat. The intergovernmental undertakings would be governed by international law were it not for the provision that not only disputes but the actual execution of the agreement itself will be regulated by the Wheat Council; breaches of the undertakings and failure through force of circumstances to carry them out are actually envisaged and are to be dealt with administratively by the Council. The particular transactions in the normal course of wheat trading will, on the other hand, be governed by national law chosen by the appropriate rules of private international law. This agreement should perhaps be regarded as anomalous, as a kind of *arrangement administratif*, a device by which commercial transactions are regulated and the quantities controlled by governments entering into what is a kind of contract of guarantee.

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the parties to delocalize their contract and to submit it to what may be called public international law, i.e. to internationalize it.' The difficulty in this approach is to say what exactly these 'supranational rules of law' are; there is too much confusion at present about state trading contracts to state positively that there are any applicable rules; we are still formulating them.

[1] Cmd. 7382: see especially Arts. III–VI and XIII.

A not wholly dissimilar type of agreement is the intergovernmental lease. Thus in 1905 the Government of the United Kingdom leased to the Italian Government an area, 150 yards square, on the east side of Kisimayu and in the British East Africa protectorate, as it then was. The annual rent to be paid was one pound sterling, and both the land, the subject of the lease, and the persons residing thereon were to remain under the authority of the laws and regulations in force in the British East Africa protectorate. Again, by agreement,[1] in intergovernmental form, between Italy and Czechoslovakia, a shed and an unloading area in the port of Trieste was leased to the Czechoslovak Government at a market value rental; the enjoyment of the lease was to be subject in all respects to the local dock regulations; disputes arising upon the agreement were to be settled by the Civil Commissioner General of Trieste. Professor Lauterpacht, who cites these two agreements,[2] considers that the first belongs to the 'domain of public international law', while the second is 'a private law lease'. It is not easy to see any difference of form or essentials between the two; both subject the occupation and use of the property leased to the local law and, in the first, to the local jurisdiction as well. It is submitted that they are both clear examples of states entering into private contracts. The Bases Agreement concluded between the United Kingdom and the United States of America on 27 March 1941[3] is more complex. Under this Agreement certain areas in Newfoundland, Bermuda, Jamaica, Santa Lucia, Antigua, Trinidad, and British Guiana were leased to the United States in consideration of the transfer to the United Kingdom of a number of destroyers. The leases themselves, contained in an annex to the main Agreement, are drafted and could only be construed in terms of English law or rather the similar law, in force in the areas concerned, as the *lex situs*. The Agreement also confers extensive rights of occupation and jurisdiction upon the United States Government in the leased areas, though there is no transfer of sovereignty.[4] It is plainly an agreement to which more than one system of law is applicable, that is to say, international law and the *lex situs* of the leased areas.

✓ 11. A contract between a state trader and a private person must, it is submitted, be governed by its proper law as determined by the conflict rules of the forum which has to consider it.[1] The view that the *lex patriae* of the state trader governs seems to be derived from a misapplication of the doctrine of sovereign immunity,[2] and there are a number of decisions in the United States and continental courts which apply their rules of private international law.[3] Some of these decisions involved contracts concluded by the Soviet Trade Delegations, as agents of the Commissariat of Foreign Trade, the Soviet Union having concluded a number of agreements with European countries subjecting the contracts made by its state trading agency to local law.[4] The recent English statutes nationalizing industry may give rise to questions[5] which can only be resolved by the application of private international law rules.

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[1] *L.N.T.S.*, vol. xxxii, p. 251.

[2] *Private Law Sources and Analogies of International Law* (1927), p. 184.

[3] Cmd. 6259.

[4] In *Connell* v. *Vermilye Brown & Co.*, the Circuit Court of Appeals in New York held, in November 1947, that the leased area in Bermuda was to be deemed to be a 'territory or possession' of the United States of America for the purposes of the Fair Labor Standards Act, 1938. The Court was, it must be observed, interpreting a federal statute and did not purport to make any pronouncement upon the effect of the Agreement in international law; but their failure to separate the international and local law aspects of the Bases Agreement led them to state rather too broad a proposition. The United States Supreme Court upheld the decision of the Circuit Court of Appeals by five to four: a petition for rehearing has been filed.

12. We may now draw certain broad conclusions: First, the principle of sovereign immunity is fast becoming an anachronism as far as state traders are concerned, and international agreement is necessary to regulate it.[6] Secondly, the status of the state trader and the form and subject-matter of the transactions into which he enters are the decisive

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[1] *Stavanger Savings Bank* v. *Norwegian Government*, *Annual Digest*, 1935–7, Case No. 8. Cf. *Rex* v. *International Trustee*, [1937] A.C. 500.

[2] *French State* v. *Carathéodory* (Court of Appeal of Paris), *Annual Digest*, 1927–8, Case No. 105: 'A private person by the very fact of entering into transactions with a sovereign State, becomes subject to its laws and jurisdiction.'

[3] *Société Monnoyer et Bernard* v. *France* (Charleroi Civil Court, Belgium), *Annual Digest*, 1927–8, Case No. 112 (reason not given in report for choice of Belgian law as applicable); *French Ministry of Finance* v. *Banca Italiana di Sconto* (Court of Cassation, Italy), ibid., 1931–2, Case No. 14 (Italian law applied as *lex loci contractus* and *lex loci solutionis*); *United States* v. *National City Bank of New York*, ibid., 1935–7, Case No. 82.

[4] See, for example, the German-Soviet Economic Agreement of 1925 (*L.N.T.S.*, vol. liii, No. 1257), which makes very clear provision for the application of German law to state trading contracts, for execution upon judgment against U.S.S.R. property in Germany, and for immunity from legal process of other Soviet agencies not operating under the authority of the Soviet Trade Delegation. See particularly Arts. 7 and 9.

[5] Provision has been made for the transfer to the National Coal Board of rights and liabilities under certain contracts. See Coal Industry Nationalization Act, 1946, s. 7 (1): 'Subject to the provisions of this section, contracts such as are mentioned in the Second Schedule . . . shall have effect in favour of and against the Board as therein mentioned and to the extent therein mentioned.' The Second Schedule defines these as 'any contract to which a colliery concern is a party so far as they are provisions entered into in the course of or for the purpose of any coal industry activities or for the purposes of the utilisation or disposal of things owned or used for any such activities'. The Board may reject any provision of a contract which it considers to have been accepted unnecessarily or imprudently, but must give notice of such rejection to the parties to the contract and the question may be referred to arbitration. The effect of this provision upon a foreign contract, for example, for the purchase of mining equipment, is peculiar. It may be asked whether the foreign contractor who finds a new party substituted for the one with whom he concluded the contract would be bound to adopt the arbitration procedure provided and could not treat the contract as avoided. There is a similar provision in the Atomic Energy Act, 1946, s. 9, for transfer to the Ministry of Supply of the rights and liabilities under 'a contract relating to the production or use of atomic energy or research into matters connected therewith, not being a contract for the rendering of personal services'.

[6] Scrutton L.J. said in *The Porto Alexandre*: 'If ships of the state find themselves left on the mud because no one will salve them when the state refuses any legal remedy for salvage, their owners will be apt to change their view.'

elements in deciding whether a binding contract has been concluded. Thirdly, the proper law of a state trading contract, or of those elements of it which are called in question, is to be determined by the normal rules of private international law.

Note

It may be convenient to give here two examples of international agreements which regulate the position of the state trader:

The Brussels Convention of 1926 abolished as between the contracting parties[1] the jurisdictional immunities of state ships engaged in commerce. Article I[2] overrides the distinction made in the English courts between state-owned and state-operated vessels;[3] Article II,[4] by subjecting state ships and cargoes of the contracting parties to the same legal actions and procedure as private vessels, completes the assimilation of the state trader to the private trader.

A more striking example, covering the whole field of state trading in goods, is to be found in the Havana Charter for an International Trade Organization.[5] Articles 29–32 of the Charter are devoted to state trading and related matters,[6] and the paragraphs relevant to the present article will now be set out.

Article 29 (1) (*a*) reads:

> 'Each Member undertakes that if it establishes or maintains a state enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases and sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminating treatment prescribed in this Charter for governmental measures affecting imports or exports by private traders.'
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> *Comments.* (1) The expression 'state enterprise' is not defined, but it is to be assumed that it is equivalent to 'public commercial enterprise', which is used in

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[1] In 1938 these were Belgium, Brazil, Chile, Denmark, Estonia, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Roumania, and Sweden. The United Kingdom is a notable absentee.

[2] 'Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject, in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.'

[3] A ship which is the property of a foreign state, whether she is engaged in the public service or is being used in ordinary private trade, is not subject to the jurisdiction of the courts; but a writ *in rem* may issue against a privately owned vessel which is operated or controlled under charter, requisition, or otherwise by a foreign state: *The Annette*, [1918] P. 111; *The Sylvan Arrow*, [1923] P. 220.

[4] 'For the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions and the same procedure as in the case of privately-owned merchant vessels and their owners.' For an interpretation of these Articles see *Annual Digest*, 1938–40, pp. 284 and 291.

[5] Cmd. 7375. The I.T.O. Charter was signed at Havana by fifty-three countries on 24 March 1948, but is not likely to enter into force before the summer of 1949. Probably the most elaborate international agreement ever drafted, it is a document of the greatest interest from both legal and commercial points of view.

[6] They form a separate section of Chapter IV which establishes general rules for the conduct of commercial policy; the other sections deal with tariffs, preferences, and internal taxation; quantitative restrictions and related exchange matters; subsidies; general commercial provisions; and special provisions.

Chapter VI of the Charter relating to Restrictive Business Practices, and is defined[1] as meaning '(i) agencies of governments in so far as they are engaged in trade; and (ii) trading enterprises mainly or wholly owned by public authority provided the Member[2] concerned declares that for the purposes of this Chapter it has effective control over or assumes responsibility for the enterprises'. It will be seen that this definition is wide enough to cover the principal state trading activities of the United Kingdom.[3]

(2) The scope of the obligation is not very clear, and the sub-paragraph might be interpreted in one of two ways. First, to treat the words 'for governmental measures . . . private traders' as mere elaboration or description of the general principle, so that the state enterprise would be bound to observe the general principles of non-discrimination but not necessarily specific governmental measures affecting private traders. Secondly, and this seems the better interpretation, to assume that the thought has become inverted in the drafting and that what is intended is that a state enterprise shall act consistently with the governmental measures affecting private traders which embody the general principles of non-discrimination[4] prescribed by the Charter.

Article 29 (1) (*b*) provides:

> 'The provisions of subparagraph (*a*) shall be understood to require that such enterprises shall, having due regard to the other provisions of this Charter, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other Member countries adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.'

Comment. The general tenor of this sub-paragraph supports the second interpretation of sub-paragraph (*a*), namely, that the broad intention is that state enterprises shall adopt 'customary business practices', and shall be guided by the normal conditions of a free market, and in general be assimilated to private traders.

Article 29 (2) (import):

> 'The provisions of paragraph 1 shall not apply to imports of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.'

Comments. (1) The doubt as to the meaning and extent of 'governmental purposes', an expression which the courts have failed to define, is somewhat allayed by the fact that commercial sale is not to be deemed a governmental purpose, and this must be taken to mean sale to domestic consumers or sale on re-export. Further light is thrown upon what are to be considered governmental purposes by Article 31, cited below. It is sufficient to observe that the experts on commercial policy and practice who prepared the Charter did not have any qualms about making the distinction between commercial and non-commercial or governmental transactions.

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[1] Art. 59 (2) (*b*).

[2] Viz. of the International Trade Organization.

[3] See paragraph 3, *supra*.

[4] These are largely concentrated in Chapter IV, and in particular in Art. 16 (general most-favoured-nation treatment); Art. 17 (reduction of tariffs and elimination of preferences); and Section B: Quantitative Import Restrictions.

(2) The sense given to commercial sale is in line with United States tax cases; see decisions cited above[1] and compare the remarks of the Supreme Court of Pennsylvania on the point.[2]

Article 30 makes the provisions of Article 29 (1) applicable to marketing boards and commissions and similar organizations.

Article 31 (1) provides:

> 'If a Member establishes, maintains or authorizes, formally or in effect, a monopoly of the importation or exportation of any product, the Member shall upon the request of any other Member or Members having a substantial interest in trade with it in the product concerned, negotiate with such other Member or Members in the manner provided for under Article 17 in respect of tariffs, and subject to all the provisions of this Charter with respect to such tariff negotiations, with the object of achieving:
>
> '(*a*) in the case of an export monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic users of the monopolized product in adequate quantities at reasonable prices;
>
> '(*b*) in the case of an import monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic producers of the monopolized product, or designed to relax any limitation on imports which is comparable with a limitation made subject to negotiation under any other provisions of this Chapter.'[3]

Comments. (1) A monopoly presumably differs little from an enterprise to which exclusive privileges have been granted in Article 29 (1).

(2) Again, the broad intention is that a state monopoly must follow the general practices of private trade and must not use its special status to distort the pattern of that trade or take unfair advantage of foreign competitors, by giving undue protection to domestic producers or consumers, by raising prices or by imposing restrictions on imports.

Article 31 (6) reads as follows:

> 'In applying the provisions of this Article, due regard shall be had for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian, or revenue purposes.'

Comment. Revenue purposes, though plainly governmental, are not made total exceptions to the application of the Article, though some qualifications would be necessary. Salt and tobacco are common examples of revenue monopolies.

Article 32 (1) provides:

> 'If a Member holding stocks of any primary commodity accumulated for non-commercial purposes should liquidate such stocks, it shall carry out the liquidation,

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[1] See p. 41.

[2] *Western Saving Fund Society* v. *City of Philadelphia*, 31 Pa. St. Rep. 175: 'The supply of gaslight is no more a duty of sovereignty than the supply of water. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as the public good. The whole investment is the private property of the city.'

[3] Provisions follow for the establishment, by negotiation or otherwise, of a maximum import duty, which is defined.

as far as practicable, in a manner that will avoid serious disturbances to world markets for the commodity concerned.'

Comment. Non-commercial purposes means here stocks of strategic or other essential raw materials.

These provisions of the Havana Charter should be completed by an international agreement, which might well be concluded under the auspices of the International Trading Organization when it is established, and which would abolish jurisdictional immunity for states parties to the agreement in respect of their state trading activities.

INTERNATIONAL LAW IN EARLY ENGLISH PRACTICE

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EMPHASIS on state practice in the field of international law—as distinct from the doctrine of the law of nations—enables us to push back by centuries the frontiers in time of international law. The rise of international law depends on two conditions being fulfilled. It requires the symbiosis of independent states. Such states must be sufficiently in contact with each other to become conscious of a choice: continuous uncertainty and possibly war of all against all, or regulated peaceful relations if only for certain periods of time. If there happens to be a certain amount of international trade between such communities, political considerations in favour of the emergence of international law are reinforced by fiscal and economic factors working towards the same end. Recent research by American and Soviet international lawyers into the history of international law in ancient times[2] and within the nexus of the Italian city-states[3] bears out this thesis. It may draw additional support from the study of early English state practice. The state practice of England—and Scotland—shares with that of the Italian city-states the distinction of dating back to the dawn of the European law of nations. Yet it may claim a feature of its own. This is its unbroken continuity over more than 800 years.

I. *The international environment of medieval England*

The coexistence over a prolonged period of the independent kingdoms of England and Scotland within 'this Nobill Ile, callit Gret Britanee'[4] made acute the need for a choice between the alternative outlined above. In view of the traditional enmity between the Crowns of England and France and the continuous friction on the English-Scottish border which predestined Scotland to become for centuries the natural ally of France, the seriousness of the issue was underlined. This situation offered to each of the three parties scope for manœuvring with any one of the two others against the third. In spite of intermittent attempts on the part of England to assert supremacy over Scotland,[1] the normal relationship between the two Crowns until the ultimate union between the two countries was well formulated in the Truce of 1381 between King Richard II and King Robert of Scotland as one of equality in the absence of a common superior.[2]

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[1] I am greatly indebted to Professor T. F. T. Plucknett, of the University of London, for having read this paper in typescript and for having made a number of valuable suggestions.

[2] Moreno, *El Derecho Internacional Público antes de la Era Cristiana* (1946), and Korovin, *History of International Law* (in Russian), vol. i, 1946 (see review by Hazard in *A.J.* 40 (1946), p. 862). Barbeyrac's *Histoire des Anciens Traitez* (1739) is also still of value. Cf. also the bibliography in Nussbaum, *Concise History of the Law of Nations* (1947), pp. 299–301.

[3] Sereni, *The Italian Conception of International Law* (1943), pp. 3 ff.

[4] In the confirmation by James III of Scotland of Confederations and Truces between England and Scotland, 26 October 1474 (11 Rymer's *Foedera* (hereinafter abbreviated to *Rymer*), 1704–35, p. 825).

The scope of England's international relations during the twelfth century will become apparent from the following catalogue of treaties and other legal documents bearing upon foreign affairs:

Treaty of Subsidy between King Henry I and Count Robert of Flanders (10 March 1101).[3]
Treaty of Alliance between the same (1103).[4]
Treaty of Succession between King Stephen and Duke Henry of Normandie (1153).[5]
Treaty of Commerce between King Henry II and Cologne (1154).[6]
Grant of the right to conquer Ireland by Pope Adrian to King Henry II (1155).[7]
Letter of Pope Alexander to King Henry II on the Peace between the Kings of England and France (1162).[8]
Treaty of Alliance between King Henry II and Count Theodore of Flanders (19 March 1163).[9]
Letter of King Henry II on the Right of Wreck (26 May 1174).[10]
Peace Treaty between King Henry II, on the one hand, and the King of France and the Sons of King Henry, on the other (11 October 1174).[11]
Treaty of Allegiance to the King of England between King Henry II and King William of Scotland (8 December 1174).[12]
Treaty of Allegiance to the King of England between King Henry II and King Rodericus of Connacta, Ireland (1175).[13]
Letter of King William of Sicily to King Henry II, confirming the obligations undertaken by oath on his behalf by his Ambassadors (23 August 1176).[14]
Compromis between King Alfonso of Castille and King Garcia of Navarra, by which they submit all their disputes to arbitration by King Henry II (24 September 1176).[15]

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[1] See, for instance, the trial of Sir William Wallace in 1305 (1 Stubbs, *Chronicles of the Reigns of Edward I and Edward II* (Rolls Series, 1882), pp. 137 ff.).

[2] 'Quoniam ex quo Reges Angliae et Scotiae non habent ipsis Superiorem, qui possit Quaestionem hujusmodi terminare, justum est et aequum quod in alium compromittant' (Art. 1 of the Truce of 18 June 1381 between England and Scotland: 11 *Rymer*, p. 313).

[3] 1 Ibid., p. 1. The Record Edition of vol. 1 of Rymer (1816) does not contain any earlier document which is relevant for the period between the Conquest and the year 1101. Thus the choice of this year by Rymer is less accidental than has been assumed. See further Hardy, *Syllabus of Rymer's Foedera*, vol. i (1869), p. li, n. 1, and Douglas, *English Scholars* (1939), pp. 285 ff.

[4] 1 *Rymer*, p. 4.

[5] Ibid., p. 13.

[6] Sartorius Freyherr von Waltershausen, *Urkundliche Geschichte des Ursprungs der Deutschen Hanse*, vol. ii (1830), p. 3.

[7] 1 *Rymer*, p. 15. The date of the much-disputed Bull *Laudabiliter* mentioned in Rymer is 1154, but should be 1155. On the whole controversial issue, see further Foreville, *L'Église et la Royauté en Angleterre sous Henri II Plantagenet* (1943), pp. 83 ff.

[8] 1 *Rymer*, p. 21.

[9] Ibid., p. 23.

[10] Ibid., p. 36.

[11] 1 De Dumont, *Corps Universel Diplomatique du Droit des Gens* (1726–31) (hereinafter abbreviated to *Dumont*), Part 1, p. 92.

[12] 1 *Rymer*, p. 39.

[13] Ibid., p. 41.

[14] Ibid., p. 42.

[15] Ibid., p. 43.

Judgment of King Henry II in the above Dispute (1177).[1]
Convention between King Henry II and King Louis VII of France regarding their Crusade (25 September 1177).[2]
Treaty of Friendship and Alliance between King Henry II and King Philip of France (28 June 1180).[3]
Letter of Emperor Cursaeus Angelus on the Right of Transit granted to King Henry II and his Army in the War against the Sarazenes (1188).[4]
Letter by King Richard I on the restitution of the independence of Scotland (5 December 1189).[5]
Treaties between King Richard I and King Philip of France regarding their Crusade (30 December 1189).[6]
Agreement between King Richard I and King Philip of France on the rules to be observed during the Crusade by their Armies (1190).[4]
Charter of Peace between King Richard I and King Tancred of Sicily (1190).[7]
Convention of Peace and Liberation from promise of marriage between King Richard I and King Philip of France (March 1191).[8]
Announcement by Emperor Henry VI to King Philip of France of the Capture of King Richard I (5 January 1192).[9]
Convention between Emperor Henry VI and King Richard I for the latter's liberation (1193).[10]
Convention between Prince John and King Philip of France (January 1194).[11]
Treaty of Peace between King Richard I and King Philip of France (1195).[12]
Treaty of Alliance between King Richard I and Count Baldwin of Flanders (1196).[13]
Treaty of Perpetual Alliance between the same (1197).[14]
Letters of King John regarding the Treatment to be accorded to the Ambassadors of the King of Portugal (30 June 1199).[15]
Treaty of Alliance between King John and the Count of Flanders (1199).[16]

The diplomatic correspondence of King Richard II with foreign princes bears witness to the expansion and intensification of England's international relations which took place between the twelfth century and the last quarter of the fourteenth century.[17] By then, the Kings of England had established regular contacts with the heads of many countries situated *in partibus longinquis*.[18] Those with whom King Richard II maintained diplomatic relations and with whom, during the period between 1377 and 1399, cases of English subjects were taken up and treaties concluded comprise on the Continent and in the eastern Mediterranean the following:

The King of France and the Dukes of Brittany and Burgundy;

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[1] 1 *Rymer*, p. 48.
[2] Ibid., p. 50.
[3] Ibid., p. 53.
[4] 1 *Dumont*, Part 1, p. 112.
[5] 1 *Rymer*, p. 64.
[6] Ibid., p. 63.
[7] Ibid., p. 66.
[8] Ibid., p. 69.
[9] Ibid., p. 70.
[10] Ibid., p. 84.
[11] Ibid., p. 85.
[12] Ibid., p. 91.
[13] 1 *Dumont*, Part 1, p. 120.
[14] 1 *Rymer*, p. 94.
[15] Ibid., p. 113.
[16] Ibid., p. 114.
[17] On thirteenth-century English diplomacy, cf. Powicke, *King Henry III and the Lord Edward*, vol. i (1947), pp. 156 ff.
[18] Letter of King Henry III of 7 July 1225, 'de instructionibus et pecunia missis ad Nuncios Regis longinquis partibus agentes' (1 *Rymer*, p. 280).

the Duke of Holland, the Count of Flanders, and the Towns of Ghent and Utrecht;
the Emperor (until his coronation as Emperor, the King of the Romans), the King of Bohemia and Hungary, the Dukes of Austria, Bavaria, Gelders, Lorraine, Luxemburg and Brabant, Mecklemburg, Stettin, Teschen and Wolgast-Pommern, the Count Palatine of the Rhine, the Archbishop of Cologne, and numerous of the Hanse Towns;
the Kings of Norway and Poland and the General Master of the Teutonic Order;
the Kings of Portugal, Aragon, Castille, and Navarre;
the Doges of Genoa and Venice, the Lords of Milan and Mantua, and the Marquess of Ferrara;
the Emperor of Constantinople and the Kings of Armenia, Cyprus, and Jerusalem.[1]

Political and economic interests combined in shaping the pattern of early English state practice in international law. First, however, the legal foundations for the growth of treaty and customary international law had to be laid: the status of the Kings of England as sovereign princes had to be established, the position of diplomatic envoys to be clarified, and an attempt made to distinguish states of peace and truce from those of war and mere absence of fighting.

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II. *The Sovereignty of the Kings of England*

In a Treaty of 1474 between King Edward IV and Duke Charles of Burgundy the status of the latter's territories was defined as the possession of territories, 'in which he does not recognize—nor can be held to recognize—any superior'.[2] Sovereignty is used in this sense in English sources

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[1] See 11 and 12 *Rymer*, and Perroy (ed.), *The Diplomatic Correspondence of Richard II* (Camden Third Series), vol. xlviii (1933).

It also deserves to be mentioned that, in the Treaty of Alliance of 14 October 1201 between King John and King Sancius of Navarre, there is an express reference to the King of Morocco, who alone is exempted from the princes against whom their alliance might become operative (1 *Rymer*, p. 127).

The bundles in the Exchequer Accounts containing the expense accounts of English diplomats regarding their missions abroad give a good idea of the scope and intensity of England's international contacts during the period between 1327 and 1450. Cf. Deprez and Mirot, *Les Ambassades anglaises pendant la guerre de cent ans* (1900) (hereinafter abbreviated to *Deprez–Mirot*).

[2] 'In quibus nec superiorem recognoscit nec recognoscere tenetur.' The document continues as follows: 'Proinde quoque, tanquam Princeps suis in Dominiis Suppremus, et nemini astrictus, liberius potest quascumque Confoederationes inire' (11 *Rymer*, p. 805). A similar clause will be found in another treaty between the same parties of the following day, 26 July 1474 (ibid., p. 811).

See also the Letter of King John of France of 27 July 1361 by which he ceded to King Edward III the County of Rouergue save, for the time being, 'la soveraineté et le derrenier ressort'; or the Letter of King Edward III of 19 July 1362 (ibid., p. 152), by which he reserved to himself the sovereignty over the Principality of Aquitania, granted on the same day to the at least since the thirteenth century[1] and well describes the status of the Kings of England.

Island Sovereignty

(As has often been said, the very island character of England emphasizes the fact of her independence.) This aspect of the matter is relevant in a more concrete sense than is usually connected with this statement. The frontiers of most medieval states—apart from those of the Italian city-states[2]—were ill defined and fluid over prolonged periods. The same applies to the frontier on the English-Scottish border, to the maritime frontiers of England, and to those of England's continental possessions. Yet there always was a clearly defined nucleus of territory in which, since time immemorial, the Kings of England exercised personal and territorial jurisdiction, and the uncontested exercise of such jurisdiction is the surest evidence of sovereignty. By the middle of the fifteenth century the King of England exercised such jurisdiction 'pour son Royaume d'Angleterre, ses Paiis d'Irlande, Guienne, et Normandie, les Villes et Places de Calaiz, Crotoy, et pour tous autres ses Paiis, Seigneuries, Hommes, Vassaulx, Feodaulx, Serviteurs, et Subjectz quelzconques et de son Obeissance tant deca comme dela la Mer'.[3]

Prince of Wales, and the acknowledgement of this position in Prince Edward's Letter of 20 July 1362 (ibid., p. 154).

The legal and political significance of the conception of kingship by the grace of God is clearly brought out in a Letter from King Henry V written in 1419 to King Charles VI of France:

'Eidem nostrae protestationi pariter hunc adjecto quod, nulli-umquam hominum in temporalibus subjiceremur nec quicquam bonorum, quae tunc habuimus aut essemus imposterum habituri, teneremus nisi a solo Deo.' Champollion-Figeac, *Lettres de Rois, Reines et Autres Personnages des Cours de France et d'Angleterre*, 1839 and 1847 (hereinafter abbreviated to *Lettres de Rois*), vol. ii, p. 370.

'Item totus ducatus Normanniae et alia quaecumque per nos in regno nostro Ffranciae adquisita, cum eorum omnia supradictorum juribus et pertinentiis universis, quae pro expressis haberentur, etiam si talia forent quae expressionem requirerent, nec sub generalitate transirent, habenda nobis et haeredibus ac successoribus nostris, tanquam domino supremo, a nullo hominum, sed a solo Deo, ita libere ab omni subjectione et obedientia cujuscumque viventis, et ita secure, sicut nos et consilium nostrum sciremus avisare, parati fuimus et essemus vobiscum componere pacem finalem' (ibid., pp. 370–1).

Cf. also Gierke, *Political Theories of the Middle Ages* (transl. by Maitland, 1927), pp. 16–17, and 2 *Lettres de Rois*, p. 136, at p. 141.

[1] See, for instance, the renunciation by Edward III of his *superioritas Regni Scotiae* on 1 March 1328 (4 *Rymer*, p. 337), or the Peace Treaty of 8 May 1360 between King Edward III and the Regent of France, according to which the King of England was to hold the ceded French territories on the same footing as the King of France had held them: 'Ce que en sovereinete en souvereinete, ce que en demaine en demaine' (6 ibid., p. 178). See also *Carta Donationis Regis Castellae Terrarum Principi Walliae Concessarum*, 23 September 1366 (6 ibid., p. 521).

[2] De La Pradelle, *La Frontière* (1928), pp. 13 ff. and Sereni, op. cit., p. 12.

[3] *De Appunctuatis per Ducissam Burgundiae Confirmatio Ducis*, 12 May 1446 (11 *Rymer*, p. 129). See also ibid., pp. 133–4.

From the early days of the doctrine of international law onwards, the inference of sovereignty from the exercise of jurisdiction in a territory has been a favourite way of arguing. See, for instance, Selden, *Mare Clausum* (1635), Book II, chap. 14. The argument obviously gains in strength if the exercise of jurisdiction is unchallenged or recognized by other sovereigns (cf. ibid., chapters 20 ff.). Cf. also Justice, *A General Treatise of the Dominion and Laws of the Sea* (1705), pp. 222 ff., and Jenks, *Law and Politics in the Middle Ages* (1905), pp. 32–6.

It would be unsafe to draw any conclusions regarding the scope of sovereignty from the titles

As England did not form part of the Holy Roman Empire, arguments in favour of England's dependence could not be drawn from membership within this feudal hierarchy.[1] Apart from duties of fealty of a strictly localized character regarding some of the English possessions on the Continent,[2] the only effective challenge to the complete independence of the English Crown came from the Holy See. King John had surrendered 'the whole Kingdom of England and Ireland into the vassalage of the Holy Roman Church', and the Pope regranted him his kingdom as that of a feudatory of the Church of Rome.[3] Henry III accepted the position created by his predecessor. But already King Henry I had to warn Pope Paschal II that even if he, the King, were willing to accept any encroachments upon England's independence, his nobles, 'nay the whole people of England would not tolerate such a state of affairs'.[4] This 'shadow of a feudal relation'[5] was removed by the parliaments of

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and 'scuchions of armes' of the Kings of England, or any other sovereign. If not merely lingering memories, they are in the early stages of international law more often than not visible symptoms of territorial aspirations. See, for instance, the Letter of 30 December 1369 from King Edward III to the Grand Seigneurs of Aquitania (2 *Dumont*, Part 1, pp. 75–6); the counter-charges by King Charles V of France of 14 May 1370 (ibid., p. 75); Art. 26 of the Treaty of 21 May 1420, between King Henry V and King Charles VI of France (2 ibid., Part 2, p. 147), the Act of Parliament of 2 December 1421 reserving the independence of England in the case of a union of the two Crowns in the person of the King of England (2 *Lettres de Rois*, p. 393) and, to give an example from Elizabethan times, Sir Nicholas Throckmorton's correspondence on the use by Queen Mary of Scotland of the titles and arms of the Queen of England. In his negotiations in France, Throckmorton justified Queen Elizabeth's use of those of France by long usage and sufferance (1 Forbes's *Papers* (1740), pp. 134, 139, 238, 240, and 339–40), this practice dating back to 1340, in which year King Edward III assumed the title and arms of the King of France.

There are also treaties by which sovereigns guarantee to each other that 'nec jus aut titulum ad Regna, Terras, et Dominia sua hujusmodi quovismodo usurpabunt, dampnumque ipsorum impedient fideliter pari modo' (Treaty of Friendship and Confederation of 6 August 1466 between King Edward IV and King Henry IV of Castille: 3 *Dumont*, Part 1, p. 589).

[1] A curious letter of King Henry II to the Emperor Frederick Barbarossa, in which the Emperor's pre-eminence appears to be recognized, is explained by Selden as being merely of a complimentary character (*Titles of Honour* (1672), Part 1, chap. 2).

On King Richard's acknowledgement—if so, then probably under duress—of the Emperor as *Universorum Dominus* and on the pretensions of the Emperor to have sole power to create notaries public anywhere in Christendom, see ibid. and 4 Coke's *Institutes*, chap. 74. In 1320 King Edward II prohibited their admission into England (3 *Rymer*, p. 829). Cf. also Lord Bryce, *The Holy Roman Empire* (1918), pp. 183 ff. and pp. 240–1.

[2] Thus, Edward I consented to do fealty to the King of France as Duke of Aquitania and Peer of France (Treaty of Perpetual Peace and Friendship, 20 May 1303: 2 *Rymer*, p. 924).

Evidence of how formal the fulfilment of these feudal duties had become by then is furnished by the letter of King Edward to King Jacob of Aragon of 13 September 1324 (1 *Dumont*, Part 2, p. 73).

On the influence of feudalism on the early law of nations, see Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe*, vol. i (1795), pp. 202 ff. Cf. also Cuttino, *English Diplomatic Administration, 1259–1339* (1940), pp. 2 ff.

[3] In 1208 (1 *Dumont*, Part 1, p. 60) and again in 1213 (ibid., p. 147). See also Luenig, 4 *Codex Italiae Diplomaticus* (1732), cols. 79–82, and the strange admission in the letter of Henry II to the Pope in 1173: 'Vestrae jurisdictionis est Regnum Angliae, et quantum ad feudatarii juris obligationem, vobis duntaxat obnoxius teneor, et astringor' (1 *Rymer*, p. 35).

[4] In a Letter written in 1103 (1 *Dumont*, Part 1, p. 60). See also the Letter of King Henry III to the Pope on the state of the kingdom of 19 December 1223 (1 *Rymer*, p. 263) and the Papal Bull of 17 April 1244 confirming the immunities and rights of England (ibid., p. 425).

[5] Stubbs, *The Constitutional History of England*, vol. iii (1903), p. 300.

Edward I and Edward III who repudiated the last vestiges of England's vassalage to Rome.[1] There might be squabbles over rank and precedence with other sovereign princes,[2] yet what really mattered was the substantial independence and equality of status flowing from it which made princes —and, subsequently, their countries—eligible to become bearers of rights and duties under international law. As it would be called in the state papers of a later period, for all practical purposes the Kings of England were *sui juris*. Other terms employed were *sibi princeps* and *imperator regni sui*.[3] The position of the Kings of England in relation to foreign princes was considerably strengthened by the plenitude of the powers of the English Crown which practically amounted to a monopoly in the conduct of foreign affairs. Four of the privileges inherent in the royal prerogative were to prove pregnant with constructive possibilities for the future development of international law: the authority to grant safe-conducts, the right to make peace and war, the treaty-making power, and the Droit of Prize.[4]

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III. *Status and powers of diplomatic envoys*

The conclusion of treaties of truce and peace as well as of the various types of treaties which were concluded within their framework was usually preceded by prolonged negotiations. It appears, therefore, apposite to deal at this stage with those aspects of the status of diplomatic envoys which are of special relevance from the legal point of view: their personal safety and their power to act on behalf of their sovereign.

(*a*) *Safe-conducts*. The status of a *vir religiosus* was in itself a protection if, as it often happened, priests and monks were used by sovereigns on diplomatic missions.[1] Yet the problem would become acute in the case of visits by one sovereign to another, or if a prince preferred to rely on the services of a layman. Then, as in the case of merchants who did not come to England under the protection of a treaty, the issue of a safe-conduct would be the means of guaranteeing safety to a foreign sovereign or envoy. Thus, the letters patent granted in 1200 to the King of Scotland provided for him and his suite a 'safe-conduct to come to us, to stay at our Court and to return safely and securely to your own country'.[2]

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[1] In 1298 King Edward I and King Philip of France agreed to submit all their disputes for arbitral settlement to the Pope, but only *tamquam in privatam personam* (Leibniz, 1 *Codex Juris Gentium Diplomaticus* (1693), p. 21). On the other hand, it was held in the sentence of 27 June 1298 that the Pope held the territories of both kings in their respective names, but without prejudice to the legal position as it existed before the judgment (ibid., p. 22. See also 2 *Rymer*, p. 821).

On 12 February 1301 the English Parliament drew up an energetic protest against the Pope's claim to overlordship over the King of England (ibid., pp. 874–5). The letter was, however, never sent to the Pope. In the words of Taswell-Langmead, 'Edward I, like many other monarchs, discovered that public protests could be combined with private compromises according to the requirements of the diplomacy of the moment' (*English Constitutional History* (ed. by Plucknett, 1946), p. 289).

Cf. also 2 Stubbs, op. cit. (1896), pp. 159 and 435, and 4 Coke's *Institutes*, chap. 1. On the felony of bringing from abroad Bulls of Excommunication, cf. 3 ibid., chap. 36.

[2] Cf. Mackenzie, *Observations upon the Laws and Customs of Nations as to Precedency* (1680); Howell, *Discourse concerning the Presidency of Kings* (1664); and 4 Coke's *Institutes*, chap. 74.

[3] See for early evidence of relations with the Emperor on a footing of equality the Letter of 13 April 1227 from King Henry III to the Emperor on the latter's proposal for a treaty of *amicitia et mutuum foedus* (1 *Rymer*, p. 292). Cf. also ibid., p. 407.

The title 'Majesty' was, however, conceded to the Kings of England by the Imperial Chancellery only in 1633 (Lord Bryce, op. cit., p. 259, note *j*).

[4] See Jenks, op. cit., p. 93, Taswell-Langmead, op. cit., p. 38, and below under III, IV, and V.

The issue of safe-conducts was a complicated affair. In each individual case application had to be made for them, and a messenger—not protected by a safe-conduct—had to be sent abroad in order to deliver the letter containing the request to the foreign sovereign for the safe-conduct and to bring home the required letters patent.[3] In the early stages, safe-conducts might be limited in time.[4] They might be restricted to the achievement of the particular objects of a mission.[5] Subsequently, they would be issued more frequently without time-limit[6] or might be completely dispensed with under treaties. In the Treaty of 30 September 1471 between King Edward IV and Duke François of Brittany, for instance, it was stipulated that, for the duration of the truce between the two contracting parties, ambassadors and messengers from one court to the other should not require any other safe-conduct than to be able to show the letters or messages which they carried with them from their prince to the other sovereign.[7] Special safe-conducts, however, were still necessary for envoys travelling to third countries, unless special provision to the contrary was made in the treaty.[8]

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[1] See, for instance, the Letters of 4 January 1220, 'De forma Treugae Regi Franciae mittenda' (1 *Rymer*, p. 236), and of 22 March 1226, 'De Tractata Pacis cum Rege Franciae resumendo' (ibid., p. 285), and Cuttino, op. cit., p. 90.

According to Gratian, those who maltreated envoys were to be excommunicated (Nys, *Les Origines du Droit International* (1894), p. 339).

[2] 30 October 1200 (1 *Rymer*, p. 121). See also the safe-conduct granted on 25 August 1242 by King Henry III to the eldest son of the King of Navarre (1 *Lettres de Rois*, p. 72).

[3] See, for instance, the Letter of 20 July 1212 of King John to the Count of Flanders (1 *Rymer*, pp. 161–2), the Letter of 24 July of King Henry III to the King of France (ibid., p. 232), or the expense account of John Pretewell for his journey to France from 25 January to 14 April 1396, in order to obtain safe-conducts for the Ambassadors of King Richard II (*Deprez–Mirot*, No. DXXIII).

[4] See, for instance, the Letter of King Henry III of 12 June 1217 regarding the safe-conduct granted to the Ambassadors of Louis, Dauphin of France (1 *Rymer*, p. 219).

[5] 'ita tamen, quod in itinere illo, non tractet de aliis negotiis, quam de negotio quod inter nos et Dominum suum Regem Castellae tractatur' (safe-conduct granted by King John to the Chancellor of the King of Castille, 8 March 1208: ibid., p. 149).

[6] Thus the Ambassador of the King of Norway to King Henry III was furnished in 1238 with 'litterae Regis de protectione patentes sine termino' (ibid., p. 382).

[7] 3 *Dumont*, Part 1, p. 438.

[8] See, for instance, the Letter of King Richard II to King Robert II of Scotland, written between 1382 and 1389, for a safe-conduct for Landgraf Johannes, who was on his way to Nor-

It becomes evident from this practice that the customary inviolability which attached to heralds or ambassadors of war[1] did not automatically extend to diplomatic envoys in times of truce or peace. Their safety entirely depended on the unilateral promises contained in safe-conducts or on treaty provisions. The underlying idea was that, for this reason, they were under the king's special protection.[2] The fiction that their immunity derived from their extraterritoriality belongs to a later period when jurists attempted to rationalize rules of customary international law which, by then, had grown on the subsoil of defunct safe-conducts and treaty clauses dispensing with safe-conducts. In some of these safe-conducts another kind of fiction was actually used. It underlies the conception behind this institution. Accordingly, 'anything that you may do to him or his suite, shall be deemed to be done to us'.[3]

(*b*) *Full powers*. The hazards of travelling in foreign parts in general, the dangers to the persons of sovereigns in particular, and the risks of rebellions in the absence of the sovereign from his homeland probably account for the fact that, from the earliest times, ambassadors were so freely entrusted with full powers to negotiate and conclude treaties and to commit their sovereigns in other ways. While subsequent full powers are

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way on business for the King of the Romans and of Bohemia (Perroy, op. cit., p. 20). The favour was asked on a basis of reciprocity: 'ut proinde ad consimilia vestre excellencie concedenda decetero nos constituatis propensius inclinatos'.

A clause providing for *transitus innoxius* of their ambassadors, messengers, or posts to third countries, provided they are not at war with one of the contracting parties, is contained in the Anglo-Russian Treaty of 16 June 1623 (17 *Rymer*, pp. 506–7).

See further Gentili, *De Legationibus Libri Tres* (1594), Bk. II, chap. 3; De Martens, *Manuel Diplomatique* (1822), p. 41; Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (1929), pp. 110–14.

[1] Their immunity was based on *armorum honesta consuetudo*, to use the language of a document of the early fifteenth century (2 *Dumont*, Part 2, p. 93). See also Gentilis, op. cit., Book I, chap. vi; 4 Coke's *Institutes*, chap. 17, and Ward, op. cit., vol. i, p. 171.

How much the recollection of the distinction between ambassadors and heralds was still alive in the sixteenth century is shown by Queen Elizabeth's exclamation in response to the insolence of an ambassador of the King of Poland: 'How have I been deceived: I looked for an ambassador; I have found a herald' (Zouche, *Juris et Judicii Fecialis sive Juris inter Gentes Explicatio* (1650), Section VIII, No. 7).

Cf. also Keeton, *Shakespeare and His Legal Problems* (1930), pp. 70–1.

[2] In the words of a safe-conduct granted by King John in 1202, the ambassador was taken 'in manu, conductu et protectione nostra' (1 *Rymer*, p. 128). The telling term *assecuratio* was also sometimes used. Cf. the safe-conduct for the King of Navarre of 2 June 1235 (ibid., p. 340).

The same conception applied in the case of a safe-conduct granted to a foreign sovereign. Thus, King Edward III 'suscepit in salvum et securum Conductum suum, ac in Protectionem et Defensionem suam specialem' the King of Navarre (12 January 1377: 7 *Rymer*, p. 133).

What might happen to an ambassador, who was found to have ventured on his errand without a safe-conduct, is illustrated by the treatment meted out to the ambassadors of King Charles V at Bordeaux by the Black Prince, known as the 'flower of chivalry' (cf. Ward, op. cit., vol. i, p. 168).

[3] Letter regarding a safe-conduct to Louis, Dauphin of France, 14 September 1217 (1 *Rymer*, p. 222). See also the Letter of King Edward I to the Earl of Lincoln, 17 November 1295 (1 *Lettres de Rois*, p. 421).

On the origin of the fiction of extraterritoriality in the doctrine of the sixteenth century, cf. Adair, op. cit., pp. 15 ff.

more elaborate and explicit, the early full powers from 1202 onwards already contain all the essentials. They authorize the ambassador to negotiate and conclude on behalf of his sovereign whatever business he may have on hand.[1] Full Powers granted in 1213 expressly mention that the king will ratify whatever his ambassadors may agree on his behalf.[2] In the following year the formula *ratum et gratum habebimus* makes its appearance.[3] In Full Powers issued in 1235, King Henry III asked the Count of Provence to conclude a marriage contract on behalf of his daughter with the king's ambassadors as if it were concluded with the king in person.[4] Ambassadors are even authorized to swear oaths on behalf of their sovereign *in animam nostram*,[5] and, by 1254, fully fledged plenary powers are in use in which ambassadors may not only bind their king but also his heirs if they should deem this expedient.[6]

IV. *Laying the Foundations*

Since the Peace Treaties of Westphalia, peace as a state of international relations has rested on multilateral treaties which provided a relatively stable framework for the following inter-war periods. Duel wars, as distinct from major wars, which again threw into the melting-pot the whole quasi-international order resting on these foundations, were fought with limited objectives within the setting of these settlements.[7] The multilateral character of these treaties has obscured the fact of the contractual character of the state of peace in international relations which is such a striking feature of early international law. If, then, anything was 'normal', it was the state of complete anarchy and licentiousness in the absence of express agreement between princes to the contrary.

The position as it then was in the absence of treaties is well illustrated by the fateful chain of events which began with a quarrel between two sailors in the neighbourhood of Bayonne or on the coast of Brittany.[1] Ward describes the incident as follows:

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[1] Full Powers regarding the Truce to be concluded between King John and King Philip of France, 26 December 1202 (1 *Rymer*, p. 132) or those issued to the Ambassadors to Emperor Otho, 1212 (ibid., p. 156).

[2] Full Powers to the Ambassadors to the Count of Flanders, 27 June 1213 (ibid., p. 173). See also ibid., p. 175.

[3] Full Powers to the Ambassadors to the King of France, 13 September 1214 (ibid., p. 191). See also ibid., p. 199.

[4] Ibid., p. 345, at 346.

[5] *Potestas de Treuga cum Francia juranda*, 2 October 1249 (ibid., p. 448).

See for a *Recognitio* on the part of English ambassadors that they had sworn peace *procuratorio nomine* that of 1 June 1258 (1 *Dumont*, Part 1, p. 208).

[6] Full Powers for the Conclusion of Peace between King Henry III and the King of Castille, 8 February 1254 (ibid., pp. 498–9). Cf. also Cuttino, op. cit., pp. 108 ff., and, for the discussion of an instance of fourteenth-century full powers, Mervyn Jones, *Full Powers and Ratification* (1946), pp. 1–2.

[7] On the relevance for international law of the distinction between duel and major wars see, further, Smith, *The Crisis in the Law of Nations* (1947), pp. 57–8, and the present writer's *International Law and Totalitarian Lawlessness* (1943), pp. 30 ff.

> 'In 1292 two sailors, the one Norman, the other English, quarrelled in the port of Bayonne, and began to fight with their fists. The Englishman being the weaker, is said to have stabbed the other with his knife. It was an affair which challenged the intervention of the civil tribunal, but being neglected by the Magistrates the Normans applied to their King, (Philip le Bel) who with neglect still more unpardonable, desired them to take their own revenge. They instantly put to sea, and seizing the first English ship they could find, hung up several of the crew, and some dogs at the same time, at the mast head. The English retaliated without applying to their Government, and things arose to that height of irregularity, that, with the same indifference on the part of their kings, the one nation made alliance with the Irish and Dutch; the other with the Flemings and Genoese. Two hundred Norman vessels scoured the English seas, and hanged all the seamen they could find. Their enemies in return fitted out a strong fleet, destroyed or took the greater part of the Normans, and giving no quarter, massacred them, to the amount of fifteen thousand men. The affair then became too big for private hands, and the Governments interposing in form, it terminated in that unfortunate war, which by the loss of Guienne entailed upon the two nations an endless train of hostilities, till it was recovered.'[2]

The factors which caused a change are of a complex character. The role played by religion and the Church has received due recognition.[3] The political and economic interests which worked in the same direction deserve to be more strongly emphasized. Foreign affairs become more calculable if, in a world full of potential and actual enemies, the position of allies and neutrals can be fixed with a certain amount of reliability.[4] It then becomes also possible—on the basis of mutual insurance between princes—to stabilize the internal position of sovereigns against rebellious nobles and dissidents[4] and, by the outlawry of all but public and just wars, to strengthen the king's monopoly in the conduct of foreign relations.[5] Finally, a minimum of international security is required in the interest of foreign trade and, in the mercantilist systems of pre-liberal economy, trade with other countries is rather consciously recognized to be the king's very direct concern.[1] Thus, interests of very different kinds contribute to the choice of sovereign princes in favour of a limitation of their unbounded discretion, and they freely use treaties in order to create a foundation for a more rational type of international relations. Treaties providing for the establishment of truce or peace, for the limitation of reprisals, and for a check on piracy are the favourite means for the achievement of this end. On this basis it becomes possible to distinguish at least to some extent the state of war from those of truce and peace.

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[1] According to more recent research, the incident happened in Brittany. See Ramsay, *The Dawn of the Constitution* (1908), p. 402.

[2] Ward, op. cit., vol. i, pp. 176–7. A fuller account will be found in Hume, *The History of England*, vol. ii (1810), pp. 486 ff.

For a similar private battle which took place between English and French ships in 1351 see Hosack, *On the Rise and Growth of the Law of Nations* (1882), p. 108.

[3] See, for instance, Ward, op. cit., vol. ii, pp. 1 ff.; Hume, op. cit., p. 2; Kennedy, *The Influence of Christianity upon International Law* (1856); or Holland, *Studies in International Law* (1898), pp. 40 ff.

[4] See further below, under V.

[5] On the connexion between public and just wars and the monopoly of foreign politics, see further the present writer's article, 'Jus Pacis ac Belli?', in *A.J.* 37 (1943), pp. 462 ff.

During the reign of King Edward III and subsequently, Parliament was frequently consulted on questions of war and peace. This, however, was not done as 'a requirement of constitutional law, but as a dictate of political prudence', owing to the increasing financial liabilities involved in the conduct of war. See Taswell-Langmead, op. cit., pp. 185–7.

(*a*) *Treaties of truce.* The frequency of truces in early English state practice is in itself an indication of the precariousness of peace in those days. Their primary purpose is to put an end to open violence and to secure for a limited period the territorial *status quo*.[2] It entirely depends on the contracting parties whether they comprise all or only some of their territories in the truce, whether it is limited to exclude spoliation on land or also extends to the high seas,[3] or whether the treaty is open for adhesion by third parties.[4] The truce may last for a few months or for a prolonged period.[5] Especially at a later stage it is likely to include clauses on the administration of justice to each other's subjects or on freedom of commerce.[6] While it lasts, a state of truce may completely assimilate the relations between the contracting parties to those in a state of peace or become a transitional stage to a state of peace.[7]

It becomes apparent from the wording of even fairly early specimens of treaties of this type how quickly a settled state practice developed in this field[1] and how standard precautions were taken against the breach of such treaties. In the absence of a clause to the contrary, any breach of the truce by a contracting party or any of his subjects entitled the other side to denounce the truce.[2] Yet should the infraction of the truce have been committed without the king's knowledge or in the face of his disapprobation, it is frequently stipulated that the truce shall remain in force.[3] Then it is for the sovereign concerned or for the keepers of the truce[4] to bring the offenders to punishment or, within more or less clearly defined limits, the injured party may have recourse to measures of self-help.[5] If, however, the truce is terminated or denounced, then the relations between the parties revert to their prestine state of lawlessness and violence.[6] Even then there is still a device left by which *ad hoc* protection can be granted to individual merchants who are not covered by treaties of truce or peace: the issue of safe-conducts, the ultimate basis in the European law of nations of both diplomatic immunity and freedom of commerce.[7]

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[1] See further below, under VI.

[2] *Treuga inter Regem Angliae et Vicecomitem de Thoarcio*, 2 November 1202: 'Ita quod nos, durante tempore treugarum, ipsi Vicecomiti, vel terrae suae malum, per nos, vel nostros non faciemus; nec Vicecomes per ipsum, vel per alium malum, vel terrae nostrae interim faciet, vel perquiret, vel fieri procurabit' (1 *Rymer*, p. 131).

Truce between King Henry III and Louis of France, 3 February 1236: 'Insuper nos, et praedictus Rex Franciae, pro nobis, et hominibus, et inprisiis nostris manifestis, toto tempore treugarum istarum, erimus in eadem saisina, in qua eramus illa die qua treugae istae captae fuerunt' (1 ibid., p. 350).

Cf. also 4 Coke's *Institutes*, chap. 26.

[3] Compare the Truce on land and sea of 7 April 1243 between King Henry III and the King of France (1 *Rymer*, p. 416) with the geographically limited Truce of 15 June 1528 between King Henry VIII and others, and Marguerite of Austria (4 *Dumont*, Part 1, p. 517).

The difference between general and territorially limited treaties of this kind is brought out by a clause in the Treaty of Peace of 14 December 1528 between King Henry VIII and King James V of Scotland: 'Non dicentur nec reputabuntur omnino generalis sive generales (Pax, treugae sive Guerrarum abstinentiae), nec se extendent ad Dominium de Lorne in Regno Scotiae, nec ad Insulam de Lundey in Regno Angliae; sed Dominium et Insula praedicta intelligentur nullo modo in hac Pace et hiis Guerrarum abstinentiis comprehensa' (ibid., p. 521).

[4] Jean de Bailleul of Scotland was included—though with reservations—in the Truce of 26 January 1301 between the Kings of England and France (1 ibid., Part 1, pp. 328–9).

[5] Compare the truces mentioned above (n. 2) with that of 12 June 1468 between King Edward IV and the Duke of Bretagne (3 ibid., Part 1, p. 438).

[6] Prolongation of Truce between King Henry VI and King Charles VII of France, 11 March 1447 (ibid., p. 564) or Truce and Treaty of Commerce of 22 July 1486 between King Henry VII and Duke François of Bretagne (12 *Rymer*, p. 303).

[7] Cf. the Letter of King Henry III of 17 July 1227 on the successful conclusion of the mission of the English ambassadors to France (1 ibid., p. 294).

(*b*) *Peace treaties.* A truce, such as the Treaty concluded on 13 February 1478 between King Henry VI and King Louis XI of France for their lifetime and a hundred years after the death of either of them, only differs in emphasis from a peace treaty. The essential feature of treaties of truce is their primarily negative and prohibitive character. The status created by such a truce is well described in the above-mentioned Treaty as *praesentes guerrarum abstinentiae.*[8] Something more positive and solemn is required if sovereigns wish to settle territorial issues with an air of finality and to establish closer bonds with other states—usually on the solid foundation of common enmity to a third power.[9] Frequently, treaties of peace provide simultaneously for a confederation and alliance,[1] and, opportunity permitting, the union is cemented by suitable political marriages.[2] Peace treaties may be concluded for a limited period,[3] but more often than not the intention of the parties is to establish a state of peace in perpetuity between their countries for themselves, their heirs and successors.[4] Even the object of universal peace is incorporated into some of these treaties.[5] Reciprocal political and economic advantages are granted more freely and comprehensively than in treaties of truce,[6] and these positive contents of treaties intended to be valid over a prolonged period give greater substance to peace treaties as compared with treaties of truce. Their real value, however, depends on the willingness of the contracting parties to prevent a relapse into indiscriminate violence and private war. For this reason, the contractual obligations undertaken by the signatories of treaties of peace and truce alike for the limitation of reprisals and the repression of piracy are of signal importance.

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[1] 'Talis est autem forma treugarum', &c. (Truce of July 1255 between King Henry III and the King of France; 1 *Rymer*, p. 555).

[2] See, for instance, the letter of King Henry III to the English Barons, 7 June 1242 (ibid., p. 405).

[3] Cf. Prolongation of the Truce between the Kings of England and France, 31 March 1324 (1 *Dumont*, Part 2, p. 66).

[4] See below, under VII.

[5] Truce of June 1228 between King Henry III and King Louis IX of France (ibid., Part 1, p. 165).

[6] See, for instance, the notification to the Barons of the Cinque Ports of the termination of the Truce with France, 15 May 1224 (1 *Rymer*, p. 272).

The Letter of King John of France of 27 July 1361 contains a vivid description of the misery caused to the civil population by the previous Anglo-French wars (2 *Lettres de Rois*, p. 136, at 137).

[7] See further below, under VI.

Thus, for instance, after the termination of the Truce with France, a safe-conduct was issued to French ships: 'Concessimus quod naves, de potestate ejusdem Regis, carcatae blado, vinis et victualibus, salvo et secure veniant in Angliam' (5 November 1226: 1 *Rymer*, p. 287).

Cf. also the Letter of King Henry III of 20 September 1242 (1 *Lettres de Rois*, p. 64); Sir Travers Twiss (ed.), *The Black Book of the Admiralty* (Rolls Series), Nos. 1–3, 1871–4 (hereinafter abbreviated to *Black Book of the Admiralty*), Appendix, pp. 380 ff., and 20 Hen. VI, c. 1. (1444), which expressly provided for the enrolment of safe-conducts granted to enemies.

[8] 3 *Dumont*, Part 2, p. 20.

[9] See, for instance, the Treaty of Alliance of 16 June 1373 between King Edward III and

(*c*) *Reprisals*. Treaties of peace and truce in themselves provided only

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King Ferdinand and Queen Eleanor of Portugal: *Amicis Amici et Inimicis Inimici* (7 *Rymer*, p. 17) or the Truce, to be followed by a final peace treaty, of 16 February 1471 between King Henry VI and King Louis XI of France: 'Les dites Seigneurs Roys de France et d'Angleterre . . . se monstreront et declaireront, l'un pour l'autre, Amy de ses Amys, et Ennemy de ses Ennemy; Reserve toujours leurs dites confederez et Alliez' (11 *Rymer*, p. 687). The powers referred to, who if they wished were to be comprised in the Truce, were enumerated (ibid., p. 685).

[1] Cf. Alliance of 31 March 1254 between King Henry III and King Alfonso of Castille (1 *Rymer*, p. 503); Peace Treaty of 20 May 1259 between King Henry III and King Louis IX of France (ibid., p. 675); or the Treaty of Peace and Friendship of 20 October 1468 between King Edward IV and King John of Aragon (3 *Dumont*, Part 1, p. 599).

[2] 'Cum igitur nullo competentiori modo inter Principes amicitia mutua contrahatur, quam per vinculum foederis conjugalis . . .' (Full Powers issued by King Henry III for the conclusion of a contract of marriage with the King of Castille, 15 May 1253: 1 *Rymer*, p. 490).

'In omnibus hujus Seculi Negotiis quod magis in animo nostro fixum semper habuimus atque illud proculdubio est, non solum Amicitiam et Foedera, quae inter Nos sunt et Serenissimum Enricum Angliae Regem . . . conservare, verum illa eadem omnibus Amoris et Consanguinitatis Vinculis roborare atque augere, ita ut nihil addi ulterius possit' (Confirmation of the Marriage Contract between the Prince of Wales and Infanta Katerina of Castille, 23 June 1503 (13 ibid., p. 76).

See also the Powers granted by King Edward II for Negotiations with the King of Aragon, 13 March 1324 (4 ibid., p. 45).

[3] Treaty of 9 April 1450 between King Henry VI and Christiernus I of Denmark (3 *Dumont*, Part 1, p. 571).

[4] Peace Treaty of October 1259 between King Henry III and King Louis of France (1 *Rymer*, p. 691); Confederation between King Henry III and King Magnus IV of Norway, August 1269 (1 *Dumont*, Part 1, p. 408); Treaty of Peace, Friendship, League, and Confederation of 5 August 1529 between Henry VIII and Emperor Charles V (4 ibid., Part 2, p. 42).

Art. 1 of the Peace Treaty of 2 April 1559 between Queen Elizabeth and King Henry II of France contains the following fulsome formulation of the object which the contracting parties had in mind: 'Vera, firma, solida, sincera, perpetua, et inviolabilis pax, amicitia, unio, confoederatio, ligua, mutua intelligentia, et vera concordia, perpetuis futuris temporibus duratura' (1 Forbes's *Papers* (1740), p. 70).

[5] '*Pacis universalis Propagationem*' *cupientes* (Treaty and Confederation of General Peace and Concord of 2 October 1518 between King Henry VIII and King Francis of France (13 *Rymer*, p. 624)). See further below, under V.

[6] See below, under VI.

the weakest barrier against a return to wholesale anarchy. If one side alleged a breach committed by the other contracting party or his subjects, and no redress could be expected—or there was no duty first to seek redress—reprisals, authorized and unauthorized, would follow and be answered in their turn with counter-reprisals. The liberty to make general or special reprisals would be granted, as happened in 1295 under a letter of reprisal against Portugal which was issued to a citizen and merchant of Bayonne in order to enable him 'to take reprisals against people of the Kingdom of Portugal and especially those of the City of Lisbon and their goods, wherever he may find them, within the jurisdiction of our lord the King and Duke, or without, to seize, retain and appropriate them, until Bernardus and his heirs or successor shall receive full restitution, including reasonable expenses incurred on that occasion, for the spoil of his goods or their value as declared above'.[1]

Self-help of this kind was bound to disturb friendly political relations between the states concerned and to increase considerably the natural hazards of medieval trade. *Raison d'état* and commercial interests[2] alike, therefore, combined in attempts to make more secure the *securus status*,[3] established by treaties of truce and peace. The general precautions taken for securing observance of treaties by the sovereigns themselves,[4] a general reparation clause,[5] or provision for arbitration[6] would go some way to achieve this object. The most difficult hurdle, however, consisted in infractions of treaties by subjects of the contracting parties and in delay or denial of justice to foreign merchants who had claims in contract or tort or were in need of protection by local criminal justice. Unless a constructive solution of this problem could be found, peace and truce would become merely nominal, and recourse would be had again to reprisals.

The answer was found in a combination of various devices. There was to be a separation between responsibility for breach of treaty which was attributable to the sovereigns themselves and acts of their subjects. In the latter case, the treaty itself was not affected in its validity,[1] but the contracting party had to make available proper organs of justice for the investigation of claims,[2] to secure restitution,[3] and frequently to make such acts punishable offences under his own municipal law.[4] Self-help might still be permitted by some treaties as an alternative or cumulative remedy,[5] but the issue of letters of reprisal was increasingly limited to the grant of special as distinct from general reprisals[6] and made dependent on the fulfilment of prior requirements. There had to be evidence of delay or denial of justice.[7] The contracting party whose subject had suffered injury must first appeal to the other side, under whose jurisdiction such a delay or denial of justice had occurred, and redress must have been refused.[8] Only then might letters of reprisal be granted. The exercise of this right might be restricted to the person and goods of the wrongdoer[1] or those living in his vicinity.[2] Vessels putting to sea might have to give guarantees for the observance of such restrictions.[3] Merchants might have to produce evidence that they were subjects of a foreign prince with whom a state of truce or peace existed.[4] Similarly, ships might have to carry flags and letters patent issued by the authorities provided for in the treaty in order to show that they were entitled to peaceful treatment.[5] Finally, in order to determine whether prizes were taken within the framework of a treaty, and that self-help did not overstep the limits of due reparation, proceedings for the adjudication of prizes taken by way of reprisals became more frequent[6] and, in the end, proceedings in prize became obligatory.[7]

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[1] Letter of 3 October 1295 (2 *Rymer*, p. 692). See also 1 *Lettres de Rois*, p. 418.

[2] 'A fin de a dez Entretenir, Multiplier, et Accroistre la Marchandise en noz Paiis et Seigneuries' (*De Appunctuatis per Ducissimam Burgundiae Confirmatio Ducis*, 12 May 1446: 11 *Rymer*, p. 129).

[3] Term used in the Letter of the Duchess of Burgundy on the Renewal of the Truce between England and Burgundy, 12 July 1446 (ibid., p. 133).

[4] See below, under VII.

[5] See, for instance, the Treaties between King Henry IV and Jean *sans peur*, Duke of Burgundy and Count of Flanders, 10 March 1406 (2 *Dumont*, Part 1, p. 304), between King Henry V and the General Master of the Teutonic Order, 4 December 1409 (ibid., p. 330), or between King Henry VI and the Duke of Burgundy of 4 August 1446: in case of infraction of the treaty, 'sera le fait Repare par les Seigneurs de l'une et de l'autre Partie, et mis en son premier Estat et den' (11 *Rymer*, p. 145).

[6] See the Convention of Mutual Peace and Friendship of 30 December 1505 between King Henry VII and Duke George of Saxony (4 *Dumont*, Part 1, p. 75). See also below, under V, and the excellent study by Colbert on *Retaliation in International Law* (1948), pp. 11 ff.

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[1] A typical clause to this effect is that contained in the Truce of 23 March 1357 between England and France: 'Ne ne serra reputee ceste Treue pur Rompue pur Attemptaz, qui se facent par ascun d'une Partie ou d'autre s'il n'estoit fait du commandement des Rois, ou des Lieuxtenans Generaus d'yceux Rois; mes se sera Restitucion et Reparacion come dit est, la Trieue tous jours durans en sa vertue' (6 *Rymer*, p. 9).

[2] See, for instance, the Truce of 31 March 1438 between King Henry VI and King James II of Scotland (3 *Dumont*, Part 1, pp. 540–1).

[3] See, for instance, the Truce cited in n. 1 above, or the Peace Treaty of 6 August 1489 between King Henry VII and King Johannes of Denmark and Sweden (3 *Dumont*, Part 2, p. 240).

[4] 'Nous les Punirons, come Violateurs de la Paix, par Peine de Corps et de Biens, sicome le cas le requerra, et qui raison voudra' (Confirmation by King Edward III of the Treaty of 8 May 1360 with France, 24 October 1360: 6 *Rymer*, p. 230). In the Proclamation of King Henry VI of 17 July 1426 on the General Peace with the Duke of Burgundy and Count of Flanders the intention is expressed 'illos, qui culpabiles et Delinquentes invenientur, taliter Punire et Puniri facere, quod caeteris cedet in Exemplum' (10 ibid., p. 362).

The Truce of 28 January 1414 between King Henry V and King Johannes of Castille (9 ibid., p. 105), providing for the punishment of offenders against the Treaty, is of special interest, as it led to the passing of a statute in the same year (2 Hen. V, st. 1, c. 6) by which the breaking of truces was made treason. As the Act met with strong opposition it was suspended in 1436 and 1442 and, when re-enacted in 1450, the provision on treason was omitted. See further Marsden, *Documents relating to Law and Custom of the Sea* (Publications of the Navy Records Society), vol. i (1915), and vol. ii (1916) (subsequently abbreviated to *Law and Custom*), vol. i, pp. 116–17.

[5] See, for instance, the Truce of June 1228 between King Henry III and King Lewis IX of France (1 *Dumont*, Part 1, p. 166) or the Truce of 31 March 1438 between King Henry VI and King James II of Scotland (3 ibid., Part 1, p. 541).

[6] The principle of individual responsibility was also emphasized by another type of treaty clause by which it was provided that individual merchants should only be responsible for contractual obligations and torts or crimes committed by such merchants. See, for instance, the Treaty of Alliance and Friendship of 4 December 1409 between King Henry V and the General Master of the Teutonic Order (2 ibid., Part 1, pp. 329–30).

[7] See, for instance, the Treaty of 8 March 1297 between King Edward I and Count Guy of Flanders (2 *Rymer*, p. 759), the Peace Treaty of 3 November 1492 between King Henry VII and King Charles VIII of France (3 *Dumont*, Part 2, p. 293), or the Decree of the High Court of Admiralty in *Reyman* v. *Bona Hispanica* (1586): Marsden, *Select Pleas in the Court of Admiralty* (vols. vi and xi of the Publications of the Selden Society), vol. i (1894) and vol. ii (1897) (subsequently abbreviated to *Select Pleas*), vol. ii, p. 161, at 162.

[8] See, for instance, the pleadings in the trial of the Mayor of Lynn in 1306 (1 Marsden, *Select Pleas*, p. 57), the reply of 18 July 1369 of the King's Council to a petition on behalf of masters and merchants of Castille and Biscay (Baldwin, *The King's Council in England during the Middle Ages* (1913), Appendix I, p. 486, the Letter of Reprisals of 14 May 1414 (9 *Rymer*, p. 125), or the Conventions of 27 March 1489 between King Henry VII and King Ferdinand and Queen Elizabeth of Castille (3 *Dumont*, Part 2, p. 223).

Within limits, this policy succeeded in establishing a contractual law of peace and in subjecting reprisals to effective state control. The distinction introduced by these treaties between international torts committed by sovereigns and their subjects and the elaboration of rules regarding denial of justice and the necessity for seeking redress by diplomatic means prior to recourse to self-help are, however, of wider significance. They are milestones on the road to the modern customary law of international tort which has grown in the fertile soil of these early treaties. Equally, it was due to these necessities that, on a considerable scale, municipal law, and especially criminal law, was put to the service of the law of nations, and the latter provided with exogenous sanctions for its enforcement.[8]

(*d*) *Piracy*. A further obstacle to the observance of treaties of peace and truce and regarding freedom of commerce consisted in the existence until the fourteenth century of considerable pirate forces in western Europe. They did not acknowledge allegiance to any of the sovereign princes, but might use the territories of these princes as bases of operation or enlist the support of the local population in the disposal of pirate goods. Their ranks would be swelled at times by the subjects of such princes, or mariners might engage on their own account in piratical ventures.[1]

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[1] See, for instance, the Truce of 31 March 1438 between King Henry VI and King James II of Scotland (ibid., Part 1, p. 540), or Art. 18 of the Treaty of 1559 between Queen Elizabeth and King Henry of France (1 Forbes's *Papers*, p. 76).

[2] Cf. the Treaty of Peace and Friendship of 24 January 1501 between King Henry VII and King James IV of Scotland (4 *Dumont*, Part 1, p. 25).

[3] See, for instance, the Truce of 3 January 1414 between King Henry V and Duke Johan of Brittany (9 *Rymer*, p. 84).

An instance of a commission of inquiry into alleged depredations at sea in violation of the Truces with Flanders and Brittany is furnished by that of 12 February 1414 (ibid., p. 116).

Cf. also *Officium Domini* v. *Sadler*; *The Fortune*, decided by the High Court of Admiralty, 1602 (2 Marsden, *Select Pleas*, p. 203, at 204), or *Officium Domini* v. *Reynolds*; *The Diamond*, 1602 (ibid., p. 204, at 205).

[4] Thus, for instance, subjects of the Duke of Brunswick to whom letters of safe-conduct had been issued by King Henry III were announced as carrying also letters patent from the Duke in which it was testified 'quod sint homines ipsius Ducis de Bruneswick' (Letter of King Henry III of 10 November 1230: 1 *Rymer*, p. 317).

[5] Cf., for instance, the Treaty of 1297 with Flanders (2 ibid., p. 759).

[6] See, for instance, the Truce cited in n. 3 above.

[7] Cf. the Statutes of 1536 and 1537 (27 Hen. VIII, c. 4, and 28 Hen. VIII, c. 15) and the Order of Council of 1589 that all ships and goods 'taken by virtue of any commission of reprisall . . . shal be kepte savely . . . till judgement hath first passed in the high courte of the Admiralty that the said goodes are a lawful prize' (1 Marsden, *Law and Custom*, p. 252).

[8] See further below, under VII.

From early times onwards, English law has treated piracy as a capital crime, and if committed by English subjects it has at times been assimilated to treason.[2] Furthermore, the Statute of the Staple of 1353 provided that if pirate goods were brought to England, merchants, foreign as well as English, should be admitted to prove their ownership, and upon proof the goods were to be restored to them without the necessity of a previous suit at common law.[3] In order, however, to avoid situations in which pirates might play off one sovereign against another, and to secure a more effective suppression of this scourge, it was found that unilateral measures were not enough. Treaties on a basis of reciprocity again provided the answer, and clauses on piracy found their place side by side with those already discussed. This appeared the natural solution; for only by treaties of truce and peace was it possible to distinguish friend from enemy and, for a long time, the border-line between *piratae et alii inimici nostri* was a thin one.[4]

In the Treaty of 24 February 1495 between King Henry VII and Archduke Philip of Austria pirates are linked with 'others who, without authority from their princes, make war on sea'. They must not be given shelter in the territories of the contracting parties, nor be supplied with provisions or shown any other favours. The Treaty contained detailed regulations regarding the procedure for the restitution of pirate goods to their owners. The contracting parties undertook to issue in their ports *edicto publico prohibitiones poenales* against the receiving and purchase of pirate goods.[1] The Treaty of Depredations of 4 October 1518 between King Henry VIII and King Louis of France dealt exclusively with these questions. It constituted a determined attempt to shorten proceedings for the recovery of piratically seized property through various devices: the establishment of central tribunals—in London the Admiral, Vice-Admiral, or their deputies[2]—the imposition of fines on inferior judges who might be recalcitrant in transferring cases from their courts to the courts stipulated in the Treaty; provision for speedy procedure: 'summarie et de plano, sine strepitu et figura Judicii, et sola facti veritate inspecta, procedentes'; the fixation of time-limits and provision for the execution—subject to bail given—of sentences pending appeal to the King's Council. Instead of execution of the sentence, the party who had obtained judgment for restitution might ask the King from whose subject he had suffered damage to make such restitution himself, provided that the claimant ceded to the sovereign concerned all actions and claims against the delinquent.[3] It was probably due to this Treaty that the Admiralty Court, whose records commence about 1520, was resuscitated[4] and a new tribunal was subsequently created for the trial of piracy as a criminal offence.[5]

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[1] Cf. Nicolas, *A History of the Royal Navy*, vol. i (1847), p. 241.

On piracy during the latter part of the fifteenth century, see Spout, *La Marine Française sous le Règne de Charles VIII* (1894).

[2] See the Statutes of 2 Hen. V, Stat. 1, c. 6 (1414) and 28 Hen. VIII, c. 15 (1536); 3 Coke's *Institutes*, chaps. 1 and 49; Zouche, *The Jurisdiction of the Admiralty of England* (1663), pp. 89–90. Sir Leoline Jenkins's charge given at a session of Admiralty within the Cinque Ports, 2 September 1668 (Wynne, *The Life of Sir Leoline Jenkins*, vol. i (1724), pp. lxxxvi–lxxxvii); Molloy, *De Jure Maritimo et Navali* (1744), p. 61; 1 Marsden, *Select Pleas*, p. xxxviii, n. 1.

[3] 27 Ed. III, Stat. 2, c. 13. For the position under the common law regarding the sale in a market overt of goods seized piratically from foreigners, though in League with England, see Molloy, op. cit., p. 67.

[4] Letter of King Edward III of 18 August 1353 (2 *Lettres de Rois*, p. 105, at 106), or *Black Book of the Admiralty*, p. 248.

In the Treaty with Burgundy of 1446 (11 *Rymer*, p. 143) pirates were still described as 'escumeurs, ou autres gens labourans sur la Guerre'.

The change in the estimation of pirates is symbolized by the changed meaning of the term which 'in former times was used in a better sense, being attributed to such persons to whose care the Mole or Peer of a Haven was intrusted' (see Dr. Cowel's *Interpreter* (ed. by Manley, 1672), *sub nomine Pirata*). See also 3 Coke's *Institutes*, chap. 49.

(*e*) *Open and just war*. The analysis of the material examined so far yields two clear results. Sovereigns were anxious to eliminate private war, and they attempted to do so by bringing reprisals under state control and by taking severe measures against piracy. Thus, there is definitely a noticeable trend from private war to public war. Equally, the disadvantages of indiscriminate violence or *procès de fait*[6] were such as to lead to the establishment of states of truce and peace on a treaty basis between parties to such treaties and third powers for whose adhesion provision was made.

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[1] 12 *Rymer*, p. 583. See also the Treaty of Commerce of 12 July 1478 between King Edward IV and Maximilian and Maria, Dukes of Austria and Burgundy (ibid., pp. 72–3), and Wortley in this *Year Book*, 24 (1947), pp. 258 ff.

[2] The Commission of the Court which included the Judge of the Admiralty of 29 May 1519, will be found in 13 ibid., p. 700.

[3] Ibid., pp. 649–53.

[4] 1 Marsden, *Law and Custom*, p. 149. On the origin of the Admiralty Court in the fourteenth century owing to difficulties experienced in connexion with foreign claims regarding piratical spoliation, see 1 Marsden, *Select Pleas*, pp. xiv and xxxv–xxxvi.

[5] Statutes of 1536 and 1537 (27 Hen. VIII, c. 4, and 28 Hen. VIII, c. 15). See also *State Papers* (*Domestic*), *Eliz.*, vol. 135, which is a mine of information on piracy and the *status mixtus* between peace and war of that period.

[6] Term used in the Renunciation of War by the Sons and Magnates of the King of France, 24 October 1360 (6 *Rymer*, p. 270).

In other documents, such *de facto* war is called *via facti* or *omnis facti actus*. See, for instance, the Powers granted by King Henry VI for the conclusion of a truce with King Charles VII of France, 27 June 1444 (3 *Dumont*, Part 1, p. 554).

If a sovereign should resort to war in breach of treaties of truce or peace, such breach of treaty might be considered by the other side as illegal.[1] Similarly, the opening of hostilities without formal *diffidatio* was considered to be a breach of custom, though not necessarily of customary law.[2] Sovereigns during the period under review did not, however, show undue hesitation to lay down in treaties of alliance their respective obligations in case of aggression by one of the contracting parties against a third prince.[3] This circumstance alone suggests caution regarding any inferences from the available material on the illegality of unjust war as distinct from illegal war in breach of treaty obligations. Considering the rather hypocritical character of this requirement in the state practice of subsequent centuries and the 'liberality' of even naturalist doctrine in this respect,[4] it would be surprising if the result had been otherwise. Then—as subsequently—decisions on policy were made first, and suitable excuses and ideologies were manufactured afterwards. In a letter to the Duke of Buckingham King Charles I expressed himself rather frankly on the subject:

> 'I have seen a draught of a manifest which ye have sent my Lord Conway, which, if ye have not published, I would wish you to alter one point in it, that whereas ye seem to make the cause of religion the only reason that made me take arms, I would only have you declare it the chief cause, you having no need to name any other; so that you may leave those of the religion to think what they will; but think it much inconvenient by a manifest, to be tied only to that cause, of this war; for cases may happen that may force me to go against my declaration (being penned so) which I should be loth should fall out.'[5]

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[1] See, for instance, the announcement by King Henry III regarding the commencement of war with the King of France, 8 June 1242 (3 *Dumont*, Part 1, p. 404); the Letters of 28 May and 28 July 1324 of King Edward II to Pope Johannes XXII (4 *Rymer*, pp. 55 and 75); or the Letter of 25 February 1235 of King Henry III to the Pope (1 ibid., p. 336).

[2] See the above Letter of 28 July 1324 (4 ibid., p. 75), and above, p. 60, n. 1.

Details regarding the ceremonies to be complied with will be found in 2 *Lettres de Rois*, pp. 495–6.

[3] See, for instance, the exchange of letters between King Edward IV and Duke Charles of Burgundy in 1474 in which they defined in great detail the mutual obligations under their Treaty of Alliance. Accordingly, in the case of a defensive war on the part of one of the contracting parties, the other was bound to give part of the stipulated assistance at his own expense, whereas, 'si Bellum non suscipiatur Defensionis Causa, sed alias inferatur, Pars, rogata seu requisita de Auxilio praestando, debebit praebere Parti illud roganti seu requirenti Sex Milia dumtaxat Armatorum sine ullo Sumpto suo; et stipiendiabuntur Armati ipsis Expensis illius Partis quae Auxilio uti volet' (11 *Rymer*, p. 809).

[4] See further in the article mentioned above, p. 62, n. 5, and Ullmann, *The Medieval Idea of Law as represented by Lucas de Penna* (1946), p. 193.

[5] Letter of 13 August 1627 (Lord Hardwicke's *Miscellaneous State Papers from 1591–1726*, vol. ii (1778), p. 14).

See also the draft of the Letter prepared by the King's Council in 1419 and intended to be sent to the King of France in case of failure of negotiations which were concluded by the Treaties of May 1419 (2 *Lettres de Rois*, p. 359, at 360): 'Bellorum remedia ad quae, ob continuatam injuriam atque justitiam denegatam ultimate oportuit in hoc casu habere recursum. . . . Et quia, post tantas et tales instantias ac requisitiones, nullum congruum poterat habere responsum, tunc primum

V. *The political superstructure*

The primary object of sovereigns in a continuously shifting and inherently dangerous international environment is to strengthen their position both internally and externally. International law could be made to serve both these ends. Treaties of alliance would fulfil the function of defining relations with the enemy's enemies.[1] Allies could be expected to show an interest in each other's internal stability and, on a basis of reciprocity, might be inclined to refuse shelter to rebels or even to extradite them. Other sovereigns might at least be kept out of the enemy's camp, and causes of friction with them could be reduced by defining their position with respect to a war between the other contracting party and a third state. Thus the law of neutrality emerges. Even the law of international political institutions makes its appearance with mediation and arbitration, and the concept of a collective system against the aggressor is used—not for the last time—in order to give ideological cover to a grand alliance.

(*a*) *Treaties of subsidy and alliance*. It is perhaps symbolic for the place of international law in a system of power politics that the first treaty recorded in Rymer's *Foedera* should be a treaty of subsidy. It was concluded in May 1101 between King Henry I and Count Robert of Flanders and only thinly veiled in a feudal garb. Accordingly, on forty days' notice either by ambassador or letter, the Count would send 500 knights to his ports for transport in the King's ships to England or he would also send them into Normandy or Main if so summoned by the King. In return, the Count was to receive an annual subsidy of 400 marks. The Treaty applied against any enemy of the King of England—'contra omnes homines, qui vivere et mori possint'—with the exception of King Louis of France, the Count's liege lord. The Count's duties

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bellum justum suum et praemissorum occasione causatum, indixit et prosecutus est, et prosecutione ejusdem omnipotens Dominus suam justiciam ostendit.'

The Letter in which King Henry V notified King Charles VI of France that he considered himself free from the above Treaties unless the King of France executed the Treaties within eight days from the receipt of this Letter, was written in a similar vein: 'Sedulo nostrae mentis revolventes intuitu, non sine visceribus compassivis, quod innumeris malis originem et fomentum diutina ministrat guerrarum tempestas, quas inter inclita Franciae et Angliae regna, ob defectum justitiae, maxima pacis solitae proscriptio suscitavit, ad ipsius reformationem, qua nichil posset in creatis delectabilius concupisci, et pro sedanda clade intestina fidelium, in quantum nostrarum virium se extendit facultas, operas adhibere sategimus efficaces. Ad hoc enim propositi nostri continua in hanc horam anclavit sinceritas, praesertim ex quo, volente Deo, ad regalis fastigii diadema conscendimus; ad hanc nostra in dies sitivit intentio, nam pacis obtentu bella gessimus, hujus desiderio gladio nos accingere curavimus militari, cum ad guerrarum vobiscum ineunda certamina legatis atque licita necessitas nos coegit, non libido dominandi aut ultrix impiaque voluntas' (ibid., pp. 368–9).

[1] Though treaties of guarantee were not yet such a prominent feature in early international law as they became subsequently, they were not entirely lacking. See, for instance, the Treaty of Friendship of 25 September 1177 between King Henry II and King Louis VII of France (1 *Dumont*, Part 1, p. 102).

towards the King of England were also defined for the contingency of an invasion of England by the King of France. If Louis was to plan such a war, the Count would do everything in his power in order to persuade him not to undertake such an enterprise. If, however, Louis was to invade England and bring the Count with him, the latter would supply only as small a contingent as he could afford without forfeiting his fief.[1]

If there is a mutual interest in military assistance, and especially if the contracting parties are about equally matched, then alliances on a reciprocal basis meet the need. They may be of a purely defensive character[2] or extend to aggressive war;[3] they may be limited to assistance against external enemies[4] or involve assistance also against rebels;[5] they may be bilateral or multilateral.[6]

The centre of interest is the definition of the *casus foederis*. From the earliest times onwards,[7] it is realized by the draftsmen of such treaties that, ultimately, the contracting parties have to rely on each other's good faith to carry out their obligations as circumstances may permit. Thus, according to the Treaty of Alliance of 5 May 1367 between King Edward III and the Count of Flanders, each side undertook to carry out his obligations 'come il pourra bonement, en bon foi et conscience, sanz fraude et malengin, despourter en regarde a la distance et prochainetee de Lieu, et Terme ou quiel la Guerre se ferra, et aussi en regard a l'estat du Paiis de Nous qui requis serra'.[8]

Sometimes, treaties of this type contain additional clauses by which the parties promise each other not to conclude any separate armistice or peace treaties,[1] or to refuse the right of passage to the enemies of the other party,[2] or they contain stipulations regarding jurisdiction over forces sent in fulfilment of the treaty[3] or regarding the spoils of common victory.[4]

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[1] 1 *Rymer*, pp. 1–3. In form, this treaty should be classified as a *fief de bourse*, that is to say, as a *fief* with an incorporeal object or, as French theorists sometimes aptly described it, as a *fief en l'air*. On the sublimation of the conception of the *fief* in the *fief de bourse*, see further Ganshof, *Qu'est-ce que la Féodalité?* (1947), pp. 131–3.

[2] See, for instance, the Defensive League of 20 May 1303 between King Edward I and King Philip IV of France (2 *Rymer*, p. 927).

[3] See, for instance, the Treaty of Confederation of 31 March 1254 between King Henry III and King Alfonso of Castille (1 *Dumont*, Part 1, p. 393), or the Offensive and Defensive League of 19 July 1372 (2 ibid., Part 1, p. 84). See also above, p. 71, n. 3.

[4] See, for instance, the Alliances of 5 May 1367 between King Edward III and Count Louis of Flanders (6 *Rymer*, p. 561).

[5] See, for instance, the Treaty of Alliance of 16 June 1373 between King Edward III and King Ferdinand and Queen Eleanor of Portugal (7 ibid., p. 17).

A diplomatic correspondence took place in 1829 between Lord Aberdeen and the Portuguese Foreign Minister on the *casus foederis* under the above and subsequent treaties between England (Great Britain) and Portugal. In it the validity of the above Treaty was recognized to the extent to which it had not been modified by such subsequent treaties. It was, however, maintained by Lord Aberdeen that, whatever might have been the original meaning of these treaties, a practice of long standing had developed, in accordance with which the *casus foederis* had been limited to cases of foreign invasion (16 *British and Foreign State Papers*, pp. 424 ff.).

[6] See, for instance, the Alliance of 7 December 1527 between Pope Clement VII, the Kings of France and England and others against the Emperor (4 *Dumont*, Part 1, p. 510); and see below, under (*d*).

[7] See the Treaty of Subsidy of 1101 (1 *Rymer*, pp. 1–3): 'per fidem, absque malo ingenio' (Art. 2). The bona fide reasons which might have prevented the Count of Flanders from accompanying his contingent to England or to Normandy are enumerated in Arts. 6 and 17 of the Treaty.

[8] 6 ibid., p. 561. See also below, under VII (*a*).

As it appeared to an historian of the law of nations by the end of the eighteenth century, these treaties were far from being merely of antiquarian interest. Ward saw, however, one great difference between the old treaties of Alliance and those of his own time: 'All the distinction . . . is that our downright ancestors named the very persons against whom the alliance was made, while the modern refinements have confined it chiefly to Quotas, and wrapt up the object in general terms.'[5]

(*b*) *Treaties of mutual insurance.* The continuous danger to sovereigns from 'overmighty subjects'[6] and the risks involved in the alignment of powerful rebels with foreign powers made it advisable for princes to restrict by treaty their right of asylum and, on a basis of reciprocity, to reinsure themselves against their enemies from within by co-operation with other sovereigns. The need for provision against such contingencies was especially pressing when sovereigns expected to be absent for prolonged periods from their realms. Thus, the Treaty of 25 September 1177 between King Henry II and King Louis of France, in which they bound themselves to take the Cross, contains a clause to this effect. Both sides undertook to banish on request each other's enemies from their dominions.[7] Another treaty concluded twelve years later between King Richard I and King Philip of France—again with a crusade in view—provided for the mutual extradition of wrongdoers.[8] Yet it becomes apparent from other treaties that sovereigns desired to have at their disposal an alternative to a possibly highly embarrassing extradition. This was either banishment[9] or punishment of the offender in the country where he had found refuge.[1] Persons assisting fugitive rebels might be liable to the same treatment as the rebels themselves,[2] and sovereigns might agree to furnish each other with information regarding the plans of rebels which would come to their ears.[3] Probably the most far-reaching attempt at mutual insurance between sovereigns was the Treaty of Friendship of 29 August 1475 between King Edward IV and King Louis XI of France. The Agreement provided for mutual assistance against each other's rebels and then dealt with the obligations of the two parties in case—*quod Deus avertat*—one of them should be expelled from his country owing to the 'disobedience of his subjects'. Then it became the duty of the other contracting party to receive the exiled sovereign *omni cum humanitate* and to assist him by all means in his power to achieve restoration.[4]

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[1] See, for instance, the Alliance of 12 July 1337 between King Edward III and Count William *Le Bon* of Holland (1 *Dumont*, Part 2, p. 161).

[2] See, for instance, the Alliance of 5 May 1367 between King Henry III and Count Louis of Flanders (6 *Rymer*, p. 560).

[3] See the Treaty cited on p. 73, n. 1, above, or the Offensive and Defensive Alliance of 14 May 1596 between Queen Elizabeth and King Henry IV of France (5 *Dumont*, Part 1, p. 526).

[4] See, for instance, the Alliance of 1 August 1351 between King Edward III and King Charles of Navarre (1 ibid., Part 2, p. 265).

[5] Op. cit., vol. ii, p. 190.

[6] This position found its ideological reflection in the medieval doctrine of the right of resistance to a *rex injustus*. The risks resulting from such claims were increased by the interest that, in times of conflict between state and Church, might be taken by the Pope in the causes of such rebels and the claim of the Church to be entitled in certain contingencies to discharge the king's subjects from their oath of fealty. See further Gierke, op. cit., p. 15, n. 34, and p. 117; and Kern, *Kingship and Law in the Middle Ages* (transl. by Chrimes, 1939), pp. 81 ff. and 194 ff.

[7] 1 *Rymer*, p. 50. On the medieval attitude to rebellion as the most practicable means of redress, see Taswell-Langmead, op. cit., p. 98 (*c*).

[8] 30 December 1189 (1 *Dumont*, Part 1, p. 379).

[9] See, for instance, the Treaty of 1373 with Portugal (7 *Rymer*, pp. 20–1).

(*c*) *Neutrality.* The early law in this field was based on a simple major premiss. It was that, unless the contrary was established by treaty, all foreign princes and their subjects were in a state of enmity with each other. Whether met on land or sea, they were fair prey. If a foreign prince or his subjects were to expect any different treatment, they had to show that they were in a state of amity with the other power concerned or at least protected by a treaty of truce or special safe-conducts. If foreign merchants entrusted their goods to enemy ships, such cargo would be treated as being infected with enemy character. If enemy property was found in neutral ships, it was already considered to be a concession if such neutral ships and the neutral cargo on board were not made to share the fate of enemy goods. If neutrals carried their own goods to the enemy, they brought comfort to the enemy. The most they could hope for was that a distinction would be made between goods which were more directly useful for the prosecution of war and others which might escape being treated as contraband.

In order to avoid the pitfalls of anachronism, it is equally essential to recall the peculiar structure of medieval trade, which was very different from that of the subsequent liberal era, during which the classical conception of neutrality flourished. The medieval trader worked within a mercantilist system, in which the direct advantages of foreign trade to princes and their realms were very consciously perceived. There was, therefore, little inclination—or reason—to distinguish between the rights and duties of neutral princes and those of 'innocent' merchants.

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[1] 'Inimicos et Rebelles alterius eorumdem, ut eorum proprios et Capitales Inimicos, Vitare Persequi et Destruere totis Viribus teneantur' (Treaty of 11 March 1471 between King Edward IV and King Alfonso V of Portugal: 11 *Rymer*, p. 742).

[2] Treaty of 28 September 1473 between King Edward IV and King James III of Scotland (3 *Dumont*, Part 1, p. 462).

[3] Treaty of Truce and Commerce of 16 February 1471 between King Henry VI and King Louis XI of France (11 *Rymer*, p. 688).

The Truce of 31 March 1438 between King Henry VI and King James II of Scotland contains an interesting clause on the revocation of safe-conducts of fugitives and the postponement of acceptance of allegiance on their part at the request of the other contracting party (10 ibid., p. 693), and provides further that 'non admittentur nec recipientur ad Officia, nec super Assisas, nec ad perhibendum Testimonium Personae Infames, Rebelles, Fugitivi, Proditores unius Partis vel alterius, aut Convicti per Assisam; sed boni, fideles, justi, fidedigni, et insuspectae Personae' (ibid., p. 694).

[4] 12 ibid., pp. 19–20.

It has often been asserted that, in those days, there was no scope for neutrality. The character of the Holy Roman Empire, the division of the world between believers and unbelievers, and other more or less convincing arguments have been put forward in favour of this thesis. It may be admitted that the term 'neutrality' dates back only to the fifteenth century.[1] The substance of the problem, however, existed long before. This could hardly have been otherwise; for the sociological basis for neutrality was pre-eminently fulfilled by the system of medieval power politics. There was a sufficient number of at least *de facto* sovereign states. Some of them were linked by a network of alliances, whereas others held themselves free to side with one or the other camp or to remain friends with both of them. This situation is well described in the first English Proclamation of Neutrality. It was issued in 1536 by King Henry VIII during the war between the Emperor and the King of France, and by it English subjects were enjoined on pain of forfeiture of goods and imprisonment no longer to cloak the goods of either French or Flemish as their own to the detriment of either belligerent. The explanation given for such detachment deserves to be quoted in full:

> 'His Highnes is knit in league and amity with either of the said Princes, not entending without honest and just occasions to violate the same, but so to order and direct himself and his subjects in all his proceedings that no manner of suspicion of the leaneing more to the one parte than to the other shall appear in anie time in his grace, but that alwayes he may declare himself in this poynt of neutrality upright and indifferent, as to a Prince of honour, troth, and virtue, apperteyneth.'[2]

Owing to their particular position in the system of medieval international relations, the kings of England were more often belligerents than neutrals. Their sea-power made them more inclined to stress the rights of belligerents at sea than the interests of neutral commerce. Yet the use of their power had to be tempered by considerations for the interests of other powers which they could ignore only at their peril. Thus, the medieval law of neutrality developed according to a logic of its own and on lines which link it organically with subsequent phases in the legal relations between belligerents and neutrals.

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[1] Cf. Nys, *Études de Droit International et de Droit Politique*, 2^{e} *série* (1901), p. 58.

[2] 1 Marsden, *Law and Custom*, pp. 149–50.

For the refinements introduced by auxiliary treaties concluded since the thirteenth century in accordance with which princes could be at war with each other in certain territories, while remaining at peace with one another regarding others, cf. Ward, op. cit., vol. ii, pp. 174 ff.

In the nature of things, England was primarily concerned with the rights and duties of neutrals in sea warfare. What was the position of neutral goods on enemy ships and vice versa? Might neutrals carry their own goods in their own ships to belligerents? Had belligerents the right of visit and search? By what procedure was the enemy character of ships and cargo or their classification as contraband to be determined?

Each of these questions arose and had to be answered. In the first instance, such issues were treated as questions within the king's discretion,[1] and not as questions of international rights and duties. Yet, out of the customary treatment of typical cases and recurrent diplomatic controversies, patterns of a rather stereotyped character developed. Thus, the rules of the *Consolato del Mare* recommended themselves widely to princes and merchants alike. Yet again treaties provided the most convenient means of guaranteeing that such treatment would be granted as a matter of right, of defining precisely the rights and duties of the contracting parties, and of departing from the regular procedure in favour of powers who could expect and, in return, would be willing to offer, preferential treatment.

1. *Neutral goods on enemy ships.* In English practice, the position of neutral cargo on enemy ships was regulated by the simple rule that, like the enemy ship itself, it was good prize of war.[2] In the Grant of the Custody of the Sea to the Earl of Salisbury of 1445 it was expressly mentioned that the same treatment also applied to English goods found on enemy vessels.[3] The fact that the rule 'The enemy flag covers friends' goods' was embodied in the *Consolato del Mare* offers evidence of the realistic character of the 'Good Customs of the Sea'; for this rule would naturally recommend itself to any strong sea power. In a sixteenth-century Order in Council, the resort to this principle was further justified

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[1] See further below, under 5.

[2] It has been held that, in this respect, English practice was less liberal than the general medieval rule. See, for instance, Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930), p. 323.

Chap. 231 of the *Consolato del Mare*, however, merely suggests the advisability of a compact in such cases between the admiral and the neutral merchants 'for a suitable price according as they may be able' (3 *Rolls Series*, p. 543).

An instance of a more liberal English practice regarding an enemy ship chartered by neutrals deserves to be mentioned. The *Seint Alphines*, a Castilean (enemy) ship, had been chartered by Aragonese (friendly) merchants and in Aragon 'ad usum et commodum dictorum Mercatorum Arragoniae onerata et carcata fuerit'. The case was reviewed by the King's Council on 5 December 1386. Held that the goods, or their true value, be restored to the claimants, but the ship 'quia fuit de parte adversa remaneat forisfacta et quod pro fretto bonorum et mercandisarum predictorum satisfiat'. Baldwin, op. cit., Appendix III, p. 510. See also Perry, op. cit., pp. 41 and 199.

[3] 1 Marsden, *Law and Custom*, p. 117.

The same principle was laid down in the Act of 1441 (20 Hen. VI, c. 1).

on the ground that 'the Frenchemen have lawes and doo putt the same in execution against the subjects of this realme whiche the counsell think convenient to be kepte lykewise towardes them'.[1] On the other hand, it might be agreed on a reciprocal basis to exempt from capture the goods on enemy ships of subjects of the other contracting party.[2]

2. *Enemy goods on neutral ships.* There is a fair number of treaties concluded by the kings of England since the thirteenth century, in which the parties promised each other to prohibit their subjects from carrying enemy goods in their ships. Merchants might then have to be furnished with official papers issued by their home authorities stating that ship, crew, and cargo were of a friendly character.[3] Sometimes it was expressly provided that the testimony under oath of the master or merchants should be regarded as sufficient evidence of the friendly nature of the cargo.[4] From the manner in which this type of clause was formulated, namely, that masters and merchants were to admit honestly, if asked, the presence on board of enemy goods, it may be concluded that though such carriage was in contravention of treaty obligations, in such a case, neutral merchants had not to fear more than condemnation as good prize of such enemy cargo and not condemnation of the ships as well. This milder practice avoided the inconveniences of the more extreme solution introduced by France in the sixteenth century,[5] and adopted by way of reciprocity in an English Order in Council of 1557.[6] The fact that this compromise between the interests of belligerents and neutrals met with general approval is illustrated by the fact that it was incorporated in the *Consolato del Mare*.[7] In accordance with these 'Good Customs of the Sea', the managing owner of the ship even received his freight to the place where he ought to have discharged his cargo. Since the fourteenth century English practice has adopted this equitable principle.[8] It becomes evident,

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[1] Marsden, *Law and Custom*, pp. 165–6.

[2] See, for instance, the Treaty of Truce of 1 August 1351 between King Edward III and the King of Castille (5 *Rymer*, p. 719).

[3] See, for instance, the Treaty of 4 August 1370 between King Edward III and the Count of Flanders (6 ibid., p. 660).

[4] See, for instance, the Treaty of Truce and Commerce of 13 February 1460 between King Henry VI and the Republic of Genoa (3 *Dumont*, Part 1, p. 583).

[5] *Édit* of King Francis I of 1543. Cf. Sir Robert Phillimore, *Commentaries upon International Law*, vol. iii (1885), p. 310. For the text of the French Ordinance of 1560 see 2 Marsden, *Select Pleas*, p. 119.

[6] 'In case that enemy goods are found in friends' ships or friends' goods in enemy ships, then the whole shal be judged to be of goode prise' (1 Marsden, *Law and Custom*, pp. 165–6.

[7] See Phillimore, op. cit., vol. iii, p. 539. On a relevant case which arose in 1164 in the war between Genoa and Pisa and in which an Egyptian ship was involved, see Pardessus, *Lois Maritimes Antérieurs au Dix-Huitième Siècle*, vol. ii (1828), p. 122, and Sereni, op. cit., pp. 53–5.

[8] Cf. the cases of *The St. Anne* (1375) and *The Ships of Flanders* (1378), 1 Marsden, *Law and Custom*, pp. 102 and 106, and on the subsequent practice until the Declaration of Paris of 1856 see Phillimore, op. cit., vol. iii, pp. 753–5.

however, from the cases of *The Two Ships of Bruges* (1327)[1] and *The Matye Sterlyng* (1373)[2] that, firstly, the condemnation of enemy cargo on neutral ships was considered to be the exercise of a well-established right,[3] secondly, the release of the neutral ship and cargo and payment of freight for the condemned enemy goods could only be expected by subjects of princes linked with the kings of England by treaties of truce or peace,[4] and thirdly, as was emphasized in the second case, rather as a matter of grace than as of right.[5] Exceptionally, treaties embodied the rule of 'Free Ship, Free Goods'. Thus, in the Treaty of 5 August 1357 between King Edward III and the King of Castille, it was agreed that Castilian ships should be entitled to carry goods belonging to subjects of the King of France who then was at war with the King of England. As was explained in the Treaty, reciprocity was achieved by a corresponding treaty between the Kings of Castille and France, according to which the King of France undertook to leave English goods in Castilian ships unmolested.[6]

3. *Contraband.* A major problem that was still to be settled in connexion with neutral trade to belligerent countries was the question of neutral cargoes in neutral ships destined for belligerent countries. The only basis of demands for the restriction of such trade was self-interest, backed by compelling sea-power. The only equivalent that, apart from increased trade with the state making such a request, could be held out to neutral princes was reciprocal treatment in a similar contingency. Thus, when King Edward III asked the Count of Holland not to supply his Scottish enemies with ships, he concluded his letter with the invitation that 'whenever it is in our power to gratify you in a like case, may you write to us as we are now writing to you'.[7] In isolated cases, it might be agreed, as was done in the Treaty of 20 May 1303 between King Edward I and the King of France, that they would not give, nor suffer to be given, any assistance to each other's enemies, and arms and victuals were merely mentioned as especially important classes of contraband.[8] Yet, as a rule, neutrals could not be induced to forgo altogether trade with belligerents. An—albeit rather

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[1] The ships belonged to citizens of Bruges and were arrested in the course of the war between England and Scotland on the charge of carrying goods belonging to Scotsmen. The Order of King Edward III of 22 December 1337, for the release of the ships with payment of freight for any Scotch goods found aboard will be found in 4 *Rymer*, p. 328.

[2] A Portuguese ship arrested during the war against Henry, the Bastard of Spain. For the Order of King Edward III for the release of the ship on the same terms as above of 20 February 1373 see 7 ibid., p. 3.

[3] According to Chap. 231 of the *Consolato del Mare*, in this case the admiral of the armed ship might force and constrain the master of the captured ship to 'carry *as a matter of obligation* the enemy's property and to keep it safe on board his ship or vessel until it is in a place of safety' (3 *Rolls Series*, p. 539).

[4] Cf. for a much more strictly formulated safe-conduct for the Catalan galley *St. Mary*, issued in 1374, 1 Marsden, *Law and Custom*, p. 97.

[5] 'Volentes cum eisdem agere gratiose' (7 *Rymer*, p. 3).

[6] 6 ibid., p. 29.

[7] Letter of 3 November 1336 (1 Marsden, *Law and Custom*, p. 65).

[8] 2 *Rymer*, p. 927.

unstable—equilibrium was reached between the interest in curtailing such trade when England was at war and those of neutrals in its maintenance by singling out trade in goods which were of most direct assistance to the enemy in the prosecution of war. As is shown by an Order of 1293 for the arrest of German and Frisian ships, suspected of contraband trade with France, the then prevailing view included in the conception of contraband 'horses, boards, arms, and divers merchandises, which they were intending to carry to Flanders and elsewhere in the Kingdom of France, for the use of our enemies'.[1] The Treaty of 4 August 1370 between King Edward III and the Count of Flanders provides an instance of a rather narrow definition of contraband goods. They were limited to *armures, artilliers, ou vitailles*.[2] The practice and treaties of this period did not differ in kind from subsequent unilateral proclamations regarding contraband or treaties on the subject,[3] and, in common with them, they failed to solve the clash of antagonistic interests on any other than a purely pragmatic basis. Yet the Treaty of 1357 between King Edward III and the King of Castille, already referred to in another connexion,[4] shows that the possibility of permitting completely unrestricted trade relations between neutrals and belligerents was not beyond the grasp of the early draftsmen. Nevertheless, this pattern imposed restraints on the use of sea-power to an extent which did not recommend itself for general adoption. In times to come, less liberal practices would be based on 'that supreme lawe of government ingrafted by nature in the hart of every souverain Prince, warranted by the lawe of God, and confirmed by the continuall practice of her neighbour nations in these latter times'.[5]

4. *Right of visit and search.* Modern doctrines on the freedom of the sea since the seventeenth century are based on the assumption that any restriction of such freedom is an exception to the rule. Thus, the right of visit and search is explained as one of the limitations which a neutral merchant ship has to suffer under international customary law. Such rationalizations

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[1] 1 Marsden, *Law and Custom*, p. 22. See ibid., at p. 21, for a detailed enumeration of the 'divers merchandises'.

[2] 6 *Rymer*, p. 660.

[3] See, for instance, on the English practice since Queen Elizabeth's Proclamation of 1589 until the beginning of the seventeenth century, the Certificate by the Lord High Admiral of 1601 (1 Marsden, *Law and Custom*, pp. 317–18), and on seventeenth-century practice in general, Lee, *A Treatise of Captures in War* (1759), pp. 154 ff.

[4] See 6 *Rymer*, p. 660.

[5] Proclamation by Queen Elizabeth of about 1601, prohibiting trade with Spain and Portugal, justified, *inter alia*, by the 'dishonourable and unworthie' practices of the late King of Spain of seeking the assistance of 'traiterous and disloyall subjects' of hers (1 Marsden, *Law and Custom*, p. 313, at 315).

See also Cheyney, 'International Law under Queen Elizabeth', in *English Historical Review*, 20 (1905), pp. 659 ff., and Jessup and Déak, *Neutrality*, vol. i: *The Origins* (1935), pp. 52 ff.

On the relatively late development of blockade in the technical sense, see Jessup and Déak, op. cit., vol. i, pp. 105 ff.

became justified when war was no longer the initial hypothesis of all argument. In the age of medieval international law there was no need for any special justification of the right of visit and search. It was implied in the right of capture of any ship that was not expressly exempted from such treatment. Thus, the right of examination of ships on the high seas was rather a safeguard for ships partaking of privileged treatment under treaties or safe-conducts. In the case of *The Seint Alphines* before the King's Council (1386), this right was taken for granted as well established[1] and it was equally so treated in the war-time instructions to the Lord Admiral which are to be found in the Black Book of the Admiralty.[2] If a ship should offer resistance, then, in the words of the instructions issued by King Henry VIII in 1512,[3] it was lawful to capture such ship 'with strong hand' and to bring her 'holy and entierly to the said Admiral without dispoyllyng, rifelying, or embeselyng of the goods, or doing harme to the parties, ther t'abyde th' ordinance of the lawe as the saide Admirall shall awarde'.

5. *Prize courts*. According to English constitutional doctrine, which dates back to the thirteenth century, all prize is a *Droit* of the Crown and can become the property of the captors only by royal grant.[4] Already in order to secure the king's own rights, it became necessary to establish some sort of procedure by which it could be established whether a prize was good and lawful. Until the sixteenth century there was not, however, any prize court of a permanent character, and matters were dealt with on an *ad hoc* basis. Thus, in 1373, King Edward III charged Andreas de Tyndale with an inquiry regarding several ships captured on the high seas.[5] Such improvisation was sufficient as long as the questions at issue were primarily those between king and captors. The situation changed when foreign merchants could increasingly demand as of right exemption of their ships and cargoes from capture. Such claims might be based on individual safe-conducts or on treaties of truce, peace, alliance, or neutrality.[6] If the rights of foreign subjects were ignored, the matter might be raised on a diplomatic level and referred by the king to his council.[7] Or, as happened in the case

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[1] Baldwin, op. cit., p. 508.

[2] Rule 7 (*Black Book of the Admiralty*, p. 29).

[3] 13 *Rymer*, p. 331.

[4] See, for instance, the grant in 1205 by King John to a captor of half of his prizes (1 Marsden, *Law and Custom*, p. 1); the right granted by King Henry III on 4 August 1242 to the citizens of Bayonne to keep half of the prizes made during the war with France (1 *Rymer*, p. 408); or the case of *The Cog of Flanders* (1337), in which King Edward III granted to the captors 'the aforesaid ship and all her apparel, which, as a capture from our enemies aforesaid, belongs to us' (1 Marsden, *Law and Custom*, p. 66). According to Rule 19 of the *Black Book of the Admiralty*, the King's share in prize was one quarter (1 *Rolls Series*, p. 21).

[5] 7 *Rymer*, p. 29.

[6] See, for instance, the Reply of the King's Council to the masters and merchants of Castille and Biscay of 18 July 1369 (Baldwin, op. cit., pp. 487–8) and the Proclamation of King Henry VI of 1426 (10 *Rymer*, p. 368).

[7] Cf. the case of *The Seint Alphines* (1386), referred to above.

of the Treaty of 1414 between King Henry V and the Duke of Brittany, the contracting parties might provide in the treaties themselves for the judicial settlement of prize cases,[1] or for their examination by the Admiral or his deputies.[2] The growing number of such treaties establishing standards for the treatment of foreign merchants, and the convenience which resulted from the possibility of answering diplomatic protests by reference to the existence of competent judicial organs, finally led to the recognition of the High Court of Admiralty in the sixteenth century as the proper court for proceedings in prize. The High Court would primarily apply the law maritime, which meant civil law, and international law only to the extent to which safe-conducts and treaties imposed limitations on municipal law. Its procedure was the general procedure in use in ecclesiastical courts. It was supplemented gradually by specific rules made necessary by the technical character of prize cases and treaty undertakings for the speeding up of—and other improvements in—prize court proceedings.[3]

(*d*) *Pacific settlement of international disputes.* In the course of the negotiations between England and France for the settlement of the French piracy claims, Richard de Graveshende set out in 1297 four possibilities for the peaceful settlement of these claims. The 'apésement' could be achieved 'par voie trétié, ou de ordenance, ou de amiable composicion, ou de arbitre'.[4] English state practice shows that all these methods were tried at times, and proved as effective as in any system of power politics. That is to say that, whenever reasons of a dynastic character or other considerations made a peaceful solution advisable, there was no difficulty in finding the appropriate legal forms for the pacific settlement of disputes. Apart from the interest of the Church in peaceful relations between Christian sovereigns—especially at times when the Holy See wished to see all their efforts concentrated on Crusades against the infidels—two other circumstances favoured mediation and arbitration during this period. Most of the princes of Christendom were related to each other by marriage or birth. Furthermore, there was not then that difference between sovereign princes and other mortals which made the pacific settlement of disputes between them a problem different in kind from that of other quarrels between medieval nobles.[5] It required the rise of the Renaissance state to throw doubt on the possibility whether suitable judges could be found for the settlement of disputes between 'supreme princes'.[1]

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[1] 9 *Rymer*, p. 84.

[2] Art. 14 of the Treaty of Peace and Commerce of 24 May 1497 between King Henry VII and King Charles VIII of France (3 *Dumont*, Part 2, p. 377). See also the case of *The Saint Salvador* (1357), 6 *Rymer*, p. 14.

[3] See above, under IV (*d*), and further, Marsden, 'Early Prize Jurisdiction and Prize Law in England', in *English Historical Review*, 24 (1909), pp. 675 ff., and Roscoe, 'Prize Court Procedure', in this *Year Book*, 2 (1921), pp. 90 ff.

[4] 1 *Lettres de Rois*, pp. 427–8.

[5] See, for instance, the *Compromis* between King Edward I and the Bishop and Chapter of Bazas for arbitration on the jurisdiction over Bazadois of 26 August 1283 (ibid., p. 320) and the judgment rendered in the same year (ibid., p. 324).

Three instances of mediation in the time of Edward I may be mentioned. King Edward I offered his mediation to King Philip le Hardi of France in the latter's dispute with the King of Castille. It was refused on the ground that the Pope had already offered mediation.[2] Edward I also mediated in the dispute over Sicily between the Houses of Anjou and Aragon, and, through his mediation, a truce was concluded in the year 1286.[3] In 1396 King Richard II accepted the offer of the Duke of Bavaria to act as 'médiatour et moieu entre nous et notre adversaire de France'.[4]

Arbitration was not essentially different from the *ad hoc* tribunals of subsequent periods. It might be entrusted to the Pope,[5] to a king in amity with both disputants,[6] to an equal number of arbitrators appointed by each side,[7] or to the ambassadors of the contestants with a possible reference, in case of disagreement between the ambassadors, to umpires selected by neutral princes.[8]

The *compromis* concluded in 1176 between the Kings of Castille and Navarre may serve as an illustration of this type of treaty. The contracting parties submitted their disputes to the arbitration of King Henry II. The King of Castille was the son-in-law of Henry II, and the King of Navarre was his uncle. Each of the parties was to give four named castles as security that he would comply with the judgment. The parties undertook to send within a specified time ambassadors to England to argue their cases before Henry II and to receive judgment. The *compromis* contained detailed provisions for contingencies such as delay on the part of the ambassadors owing to illness or captivity. While, in such cases, the castles would not be forfeited, it would be otherwise if, without good reason, the ambassadors failed to make their appearance before the English Court. In the case of the death of the arbitrator, the King of France was to be his substitute. Furthermore, the parties agreed to a seven years' truce, made provision against its infringement, stipulated to settle by arbitration any new dispute that might arise between them, and agreed to carry out the treaty in good faith and without bad intentions.[9]

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[1] Letter of Queen Elizabeth to Emperor Rudolph, 21 April 1593 (16 *Rymer*, p. 206).

[2] Letter of King Philip le Hardi to King Edward I, 6 December 1281 (1 *Lettres de Rois*, p. 286).

[3] 2 *Rymer*, p. 330. See also ibid., p. 501.

[4] 2 *Lettres de Rois*, p. 288.

[5] See, for instance, the arbitration between King Edward I and King Philip of France of 1298 (1 *Dumont*, Part 1, pp. 308 ff.).

[6] See, for instance, the Treaty of 24 September 1176 between the Kings of Castille and Navarre, to accept judgment from King Henry II of England (1 *Rymer*, p. 43).

[7] See, for instance, the Treaty of 23 April 1294 between King Edward I and the King of Portugal (2 ibid., p. 632).

[8] See, for instance, the Treaty of 16 March 1474 between King Edward IV and King Christiernus of Denmark (3 *Dumont*, Part 1, p. 528).

[9] 1 *Rymer*, pp. 43–4.

This Treaty is typical of the numerous arbitration treaties which were subsequently concluded. They have in common a very wide formulation of the issues which were considered to be justiciable and a tendency to settle matters *in amicitia aut jure* rather than on the basis of strict law.[1] This will explain why, frequently, the *compromis* was not followed by a judgment, or such a decision was superseded by the turmoil of war between the parties to such treaties.

The offers of various kings of England to settle their disputes with foreign princes by ordeal of battle—either alone or accompanied by a number of their knights—may be mentioned as *curiosa* of merely tactical significance. They were never accepted, and were not meant to be taken too seriously.[2]

The attempts at power politics in ideological disguise in the later part of the medieval period are of greater interest. Fifteenth-century diplomacy was fully alive to these possibilities, and this approach to international affairs was well formulated in a letter sent in 1419 by King Henry V to King Charles VI of France. It put the matter in a nutshell: 'Aliud agitur et aliud agi simulatur.'[3] This might well have been the motto of the Italian League promoted by the Pope and adhered to by several of the most powerful European princes, including King Henry VII. In Henry VII's letter of accession of 1496 its purposes were described as being to serve peace, maintain the dignity and authority of the Holy See, and to promote the Christian religion. The union was to last for a minimum period of twenty-five years. The members guaranteed to each other their territorial possessions against any disturbance. The Covenant provided for peaceful settlement of disputes, for assistance to the victim of aggression, and for support from the Pope with his 'spiritual weapons'. Members of the League were not to conclude separate peace treaties, and any territories of a member which had been invaded were to be restored to the victim of aggression.[4] In spite of its noble language, the Treaty was nothing but a grand alliance in disguise against France. In the following year, however, King Henry VII thought it wise to reinsure himself by a treaty of peace and commerce with King Charles VIII of France.[1] The League of Cambray, to which Henry VIII adhered in the year 1512,[2] and the Treaty of General Peace and Concord of 1518 against the Turks[3] were conceived in the same spirit. The possibilities inherent in the use of the political superstructure of international law for ideological purposes had become fully apparent.

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[1] See, for instance, the Treaty cited above on p. 83, n. 8, and Cuttino, op. cit., pp. 49 ff.

[2] See, for instance, the Letter of King Edward III to King Philip of France, 26 July 1340 (1 *Dumont*, Part 2, p. 189), and the latter's reply (ibid., p. 196). See also Selden, *Jani Anglorum Facies Altera* (1683), Book I, chap. 19.

[3] 2 *Lettres de Rois*, p. 371.

Probably the earliest attempt made in English state practice to enlist academic support for purposes of foreign policy was Edward I's invitation to the Universities of Oxford and Cambridge to refute the Pope's claim to the Kingdom of Scotland as a fief of the Roman Church, as set out in the Pope's Bull of 1299. Edward's reply of the following year which was never sent, but served its purpose as an appeal to public opinion at home, commenced with a description of 'how Brutus of Troj after her distruction came to Albion' and proceeded from this solid basis to a demonstration of the superior English claims to Scotland (1 *Dumont*, Part 1, p. 322).

[4] 12 *Rymer*, p. 638.

VI. *The economic superstructure*

As in the political field war must be considered as the initial hypothesis, so we must start in the economic field from the basic assumption that the individual is rightless abroad. However, just as there were good reasons why there should be a minimum of stability and calculability in political affairs, there were corresponding tendencies in the economic field. They received strong support from the doctrines of medieval bullionism, as this type of mercantilism is aptly described. Thus, it was ordained in the Statute of the Staple that foreign merchants should be under the king's protection and only pay the ancient customs in order 'to replenish the said Realm and Lands with Money and Plate, Gold and Silver, and Merchandises of other Lands, and to give Courage to Merchant Strangers to come with their Wares and Merchandises into the Realm and Lands aforesaid'.[4] As becomes apparent from Letters of Marque and Reprisals issued against the Genoese in 1413, equal attention was paid for the same reasons to the export trade, and the merchandises mentioned in these Letters had been sent 'to Western parts, there to be sold for the advantage and increase of Our Realm'.[5]

The more far-sighted amongst the medieval princes furthered these objects of commercial policy by unilateral enactments under their own systems of municipal law and guaranteed to foreign merchants safe entry and stay in their realms and unhindered exit from them. As becomes evident from Article 41 of Magna Carta, provided that English merchants received reciprocal treatment, even enemy merchants could expect to continue their trade in England during war as in time of peace.[6]

Within the compass of this paper, it is not possible to describe in detail the growth of international economic law as applied in early English state practice. The general trend, however, can be sketched in brief.

The first stage in the evolution was characterized by an increasingly

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[1] 3 *Dumont*, Part 2, p. 376.

[2] 13 *Rymer*, pp. 305 and 323.

[3] Ibid., pp. 621 and 623.

[4] 1353 (27 Edw. III, Stat. 2, c. 2).

[5] 8 *Rymer*, p. 773.

[6] See further the present writer's 'The Protection of Human Rights in British State Practice' in *Current Legal Problems*, 1 (1948), pp. 152 ff.

For the case of the arrest of French merchants in England in 1242, following the arrest of English merchants in France, see Nicolas, op. cit., vol. i, pp. 198–9.

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I liberal grant of safe-conducts to individual foreign merchants.[1] The mutual interests of princes in foreign trade secured as a rule a *de facto* reciprocity in the grant and scope of such safe-conducts.

It was, however, soon found convenient to secure the right of safe-conducts for each other's merchants on a treaty basis and, thus, to establish *de jure* reciprocity of treatment in this field. Princes might consent only to deal with each individual application for a safe-conduct on its merits[2] or II agree to grant safe-conducts if, and when, required.[3] If trade relations between two countries became sufficiently close they might stipulate that, by virtue of the treaty, their merchants should be considered for the duration of the treaty to be under their safe-conduct[4] and not to require any general or special safe-conduct beyond the treaty itself.[5]

From this second phase, it was only one further step to provide positively for mutual freedom of commerce between all subjects of contracting parties. It was usual both to stipulate general standards of treatment and the enjoyment of especially important rights. Amongst the general standards, those of national and most-favoured-nation treatment were of particular importance.[6] III Individual rights which for a long time were enumerated in detail in commercial treaties, were those of the protection of the person, liberty, and property of foreign merchants and their free access to local courts.[7] From the point of view of the general development of international law, this latter type of treaty clause is of special significance. It consists in the fact that most of these rights found general acceptance in the course of centuries of constant treaty practice and became gradually embodied in international customary law.

In order to see the picture of the economic superstructure of medieval international law in its proper perspective, it is necessary to remember the security which commerce received indirectly from some of the treaties in the political field. Apart from the basic treaties of truce and peace, those limiting reprisals, providing against denial and delay of justice, stipulating for effective measures against piracy, and determining the rights of neutral merchants should be recalled.[8]

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[1] See, for instance, the Letter of 13 September 1215 of King John to King Philip of France (1 *Rymer*, p. 207).

[2] Treaty of Peace and Friendship of 24 January 1501 between King Henry VII and King Jacob IV of Scotland (4 *Dumont*, Part 1, p. 24).

[3] Treaty of 12 February 1479 between King Edward IV and King Christiernus of Denmark (3 ibid., Part 2, p. 66).

[4] Treaty of Peace and Friendship of 20 October 1468 between King Edward IV and King Johan of Aragon (ibid., Part 1, p. 600).

[5] Treaty of Perpetual Friendship of 25 July 1474 between King Edward IV and the Duke of Burgundy (ibid., p. 485).

[6] See further the present writer's 'The Most-Favoured-Nation Standard in British State Practice', in this *Year Book*, 22 (1945), pp. 96 ff., and 'The Province and Standards of International Economic Law', in *International Law Quarterly*, 2 (1948), pp. 402 ff.

[7] See, for instance, the Treaty cited below on p. 87, n. 2.

[8] See above, under IV and V.

VII. *The character and binding force of medieval international law*

The examination of early English state practice in international law permits tentative generalizations on the character of medieval international law. Even in so far as English practice is concerned, these results are very provisional and require to be tested especially in the light of the manuscript material which it has not yet been possible to use for this paper. Equally essential are parallel investigations regarding the practice of other countries and the comparative analysis of such case studies. Only then will it be possible to arrive at conclusions of more finality than is possible at this stage.

(*a*) *The predominance of treaties.* The overriding feature is the predominance of treaties as compared with international customary law. At first sight, it might be suspected that this is merely due to the greater difficulties in preserving the knowledge of the unwritten law. That this is not the real answer can be shown in several ways. Records of customary maritime law such as the *Consolato del Mare*, the Laws of Oleron, or the Black Book of the Admiralty present a wealth of rules of customary law in fields where such customs existed, that is to say, between merchants and merchants. The very fact that these compilations contain a few references to the law of neutrality and attempt to state whatever little law there appeared to exist in the field of inter-state relations indicates the vacuum in the absence of treaties. This conclusion is borne out by the records of relevant decisions of English courts. In matters of spoliation, prize, or piracy, they primarily applied the common law, general principles of equity, or civil law as the case might be. ~~International law would only~~ come in as an overriding limitation if there was a treaty. Then a foreign merchant could claim this privilege in the same way as he might produce an individual safe-conduct granted to him by the king. Thus, in the case of the *Masters and Mariners of Castille and Biscay* (1369), who complained of unjustified reprisals and denial of justice, the King's Council dealt with the question of restitution of their properties by reference to treaties, good faith, and *droit et equite*.[1] There does not, however, appear to be evidence for the proposition that the law maritime was conceived as anything but a branch of municipal law in the sense of a law applicable between subjects, and which some maritime states might have in common.[2] A further test is provided by the diplomatic correspondence in disputes between the kings of England and foreign princes. If there had been generally accepted rules of international customary law, it would have been likely that appeal would have been made to such law with the same frequency as reference was made to treaties, general principles of justice and equity, and the mutual interest of princes in reciprocally favourable treatment of each other and their subjects.[1]

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[1] Baldwin, op. cit., pp. 487–8. See further 1 Marsden, *Select Pleas*, pp. xxv–xxix, and 2 ibid., p. 92.

[2] See, for instance, the Treaty of Peace, Confederation, and Friendship of 30 June 1523 between King Henry VIII and King Christiernus of Denmark (4 *Dumont*, Part 1, p. 388).

The paucity of rules of international customary law is not surprising if the contractual basis of states of truce and peace between medieval rulers is remembered. In addition, there was less opportunity in the field of international law than within municipal law to define such rules by means of judicial decisions. Even so, the vagueness of medieval customary law was such that, even within the state, the quest for certainty led to a perfect obsession with charters, 'the solitary firm pillar of legal tradition'.[2] This aspect of the matter, which further explains the emphasis on treaties during this period, becomes quite explicit in some of the earlier treaties. Thus, in the marriage contract of 1173 between King Henry II and the Count of Mauriana, the reason for this document is stated as follows: 'Quam in dubium venit, quod a memoria recedit, repertum est, in rei gestae testimonium, perhennis rescripti remedium.'[3]

Owing to the frequent use made of treaties, the technique of draftsmanship became highly developed from an early stage onwards, and most of the clauses found in modern treaties or meanwhile transformed into rules of customary international law can be traced back to these early treaties. They contained elaborate provisions regarding duration, interpretation, participation of third parties, relations between treaties, and consequences of breach of treaty by one of the contracting parties. The civilist and canonist background, against which these treaties were drafted, is unmistakable. The way, however, in which the customary exceptions of the civil and canon law were frequently declared to be inapplicable is of significance. It shows that the draftsmen of these treaties worked on the assumption of a practically complete freedom of contract on the part of sovereign princes, and that they freely adapted the legal forms as applied between individuals so as to meet the requirements of relations ultimately based on the rule of force.[4]

Natural law does not appear to have decisively influenced this treaty practice. Like references in preambles of treaties to the precepts of Christian religion and to Augustine, natural law made a rather belated appearance in treaty clauses from the middle of the fifteenth century onwards. In these cases it served ornamental rather than any other purposes.[5] In others it was used—in diplomatic practice already earlier—either as a spurious title-deed, whenever more solid foundations for political claims were lacking, or as a means of denouncing one's opponents.[1] In this respect, too, there appears to exist a remarkable continuity in the evolution of international law.

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[1] See, for instance, Perroy, op. cit., Nos. 46–9, 103–5, or 144–8, or 2 *Lettres de Rois*, p. 195.

[2] Kern, op. cit., p. 174.

[3] 1 *Rymer*, p. 33. See also ibid., p. 281.

[4] See, for instance, the Treaty of Peace, Friendship, and Confederation of 30 August 1525 between King Henry VIII and King Francis I of France (4 *Dumont*, Part 1, p. 439), and the valuable introduction by Mr. H. Jenkinson to the catalogue of an Exhibition of Treaties at the Public Record Office, 1948.

[5] See, for instance, the Convention of 9 April 1450 between King Henry VI and King Christiernus I of Denmark (3 ibid., Part 1, p. 569).

(*b*) *Sanctions of treaties*. Medieval draftsmen tried to secure the observance of treaties on the part of their masters by means of a variety of devices. Frequently these were employed cumulatively in one and the same treaty.[2] In the first place, special credibility was attached to the 'word of Princes'. In order to strengthen the signatures of sovereigns, it was frequently stipulated that the treaty was to be confirmed and ratified by the three estates of the realms concerned. This was not due to any limitation of the king's treaty-making power. At least in so far as England was concerned, the king's prerogative in this respect was unchallenged. Naturally, this did not exclude that the king might find it prudent to assure himself of the support of Parliament, and this was frequently done.[3] As it was put by King Henry III in a letter of 1220 to the King of France, he was prepared to 'strengthen' in this way the truce between the two princes.[4] Material pledges might be added to the signature and ratification of treaties with or without the consent of Parliament. They would range from giving hostages to the hypothecation of all the movable and immovable possessions of the contracting parties, sometimes including also the private property of their subjects.[5] Supernatural sanctions might be added in the form of an oath and, with the co-operation of the Pope, breach of treaty might be threatened with the penalty of excommunication.[6] *Conservatores* or *Dictatores* might be appointed from amongst powerful nobles of the contracting parties to watch over the observance of the treaty, or foreign princes in amity with both sides might be asked to discharge this function.[7] Yet, in substance, the situation would be very much as it was to be in times to come. In the case of political treaties, they lasted as long as the underlying power position remained unaltered. Their strength lay in the reciprocal interest of the parties to such treaties in observing them. If this basis vanished, they would be broken under the flimsiest of pretexts, as in fact frequently happened.

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[1] See, for instance, the Letter of King Edward II to Pope Johannes XXII, 8 March 1325 (1 *Dumont*, Part 2, pp. 73–4).

[2] See, for instance, the Treaty of Peace of 8 May 1360 between Edward, Prince of Wales, and Charles, Dauphin of France (2 ibid., Part 1, pp. 12 and 15–16).

[3] See n. 5 on p. 62 above.

[4] 1 *Rymer*, p. 237.

[5] See, for instance, the Convention of 27 March 1489 between King Henry VII and the King and Queen of Castille (3 *Dumont*, Part 2, p. 224).

[6] In a letter sent in 1209 to some German princes, King John referred to the alliance with them, 'de scriptis et sacramentis firmata, quae de jure rumpi non poterit, nec debebit' (1 *Rymer*, p. 154).

[7] King Henry VIII was one of the conservators of the Treaty concluded in 1521 between the Emperor Charles V and King Francis I of France (4 *Dumont*, Part 1, p. 353).

Within this rather unstable quasi-order—and as long as it lasted—treaties of a primarily economic character flourished; for here the sanctions inherent in any system of reciprocity could work with less hindrance than in the field of high politics. The frequency with which this element of reciprocity was expressly mentioned both in diplomatic correspondence and treaties proves the consciousness of the draftsmen of the value of the law of reciprocity. The principle was expressed in a classic form in the letter of King Edward VI which Sir Hugh Willoughby and Richard Chancellor took with them in 1553, in their attempt to discover Cathay. The king authorized them to

> 'goe to countries, to them heretofore unknown, as well as to seeke sitch things as we lacke, as also to carry unto them from our regions, sitch things as they lacke. So that hereby not only commoditie may ensue both to them and us, but also an indissoluble and perpetual league and friendship. . . . We therefore desire you Kings and Princes, and all other to whom there is any power on Earth, to permit unto these our servants, free passage by your regions and dominions; for they shall not touch any thing of yours unwilling unto you.—Consider you, that they also are men. If, therefore, they shall stand in need of any thing, we desire you of all humanitie, and for the nobilitie which is in you, to aide and help them with such things as they lacke.—Shewe yourselves towards them, as you would that we and our subjects should shewe ourselves towards your servants, if at anie time they shall passe by our regions.'[1]

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[1] 2 Ward, op. cit., p. 212.

THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE LEGAL OPINIONS OF THE UNITED NATIONS SECRETARIAT

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I

WHATEVER may have been the merits of the political realism of Dumbarton Oaks and San Francisco, with its emphasis on security rather than law, it has since become to be widely recognized—to the point of becoming almost a truism—that legal principles and legal processes are essential to the maintenance of international peace. This fact has been evidenced by the persistent efforts within the United Nations to extend the rule of law to the vital areas of international relations and to apply more effectively existing precepts of international law.

It is understandable that, in the light of these far-reaching efforts, relatively little recognition should have been accorded to another aspect of the development of law within the United Nations—namely, to the building up of legal rules and precedents through the daily practice of its various organs. A further explanation of this fact is that these legal decisions and opinions are scattered throughout records of meetings, secretariat memoranda, press releases, and other miscellaneous documents.[2] Moreover, legal questions are usually presented in the context of policy or administrative problems and are often considered as incidental questions by the organs whose main functions are not primarily legal. Nevertheless, it is clear that these legal decisions are adding, bit by bit, to the body of international law. Indeed in some fields it seems safe to predict that when welded together they will form a coherent and useful system of law.

In the present article an attempt will be made to present and analyse some legal opinions of the Secretariat which are of particular interest in regard to the development of law within the United Nations.

II. *The place of law in the United Nations and the role of the Secretariat*

In considering the place of law in the United Nations there is a temptation either to exaggerate the importance of legal principles or to belittle their role; both tendencies may easily be supported by documentary references.[1] In fact, the United Nations, like other complex political institutions, reveals opposing tendencies, and one may readily find in its Charter and history the classical antinomies of security against justice and of rule versus discretion. Nevertheless, it would seem proper for the international lawyer, while recognizing the emphasis on security and the wide areas of discretion in the Charter, to draw particular attention to the importance which has been attached to legal principles and processes in the work of the Organization.[2] He should—it is submitted—lay stress on the fact that notwithstanding the flexible and 'realistic' character of the Charter, it has been realized that the action of Members and of the Organs of the United Nations are not simple 'acts of policy' free of legal restraints. This recognition of the legal element has not been limited to the somewhat obvious fact that the Charter lays down constitutional limitations and powers. It extends, for example, to a realization that the Charter is itself a legal instrument, a multipartite treaty, whose interpretation and application should be based on principles of international law.[3] Furthermore, the fundamental principles of the Organization, as set forth in Chapter I, are themselves 'largely declaratory of the rules of customary law which were binding upon the Members of the international community even before the Charter'.[4] Finally, it should not be overlooked that even sovereign states desire to avoid what may appear to be acts of arbitrary discretion or decisions based solely on their own determinations of their special interest. This is especially true in the widely publicized open forum of the United Nations. Legal principles are thus given force for the reason that they are by their very nature rules of general applicability. This is not to suggest that legal rules may not have been used or abused to support political interests; what is of importance in this context is that the Members of the United Nations do find it necessary, for whatever reason, to maintain that their acts are in conformity with legal principles and procedures. A mere cursory examination of the records of United Nations proceedings is sufficient to indicate that the appeal to the authority of law has not been an insignificant element in the major political debates.[5]

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[1] Unless otherwise indicated, the views expressed in this article are those of the author and do not necessarily reflect the official opinion of the United Nations Secretariat.

[2] See Annual Report of the Secretary-General for the period ending 30 June 1948 (U.N. Doc. A/565 at p. 108).

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[1] See, for example, the divergent statements made by delegates at the San Francisco Conference in regard to the place of law in the United Nations which are quoted in Chakste, 'Justice and Law in the Charter of the United Nations', in *A.J.* 42 (1948), pp. 590 ff.

[2] It may be well to recall, in this connexion, Professor Lauterpacht's observation that '. . . it is essential that international lawyers should develop an attitude of criticism in regard to the very effective—although now somewhat trite—argument that law is not a panacea. . . . The reign of law . . . is not the only means for securing and preserving peace among nations. Nevertheless, it is an essential condition of peace' (Lauterpacht, *The Function of Law in the International Community* (1933), p. 437).

[3] Pollux, 'The Interpretation of the Charter' in this *Year Book*, 23 (1946), p. 54.

[4] Liang, 'The Legal Basis of International Relations', in *Annals of the American Academy of Political Science*, 255 (1948), pp. 22, 23.

[5] See, for example, the discussions of the Iranian question at the Security Council in April 1946 (*Journal of the Security Council*, Nos. 27, 30); of the Egyptian question at the Security

It is, however, important to observe that although legal considerations have been frequently invoked in the debates of the United Nations, they have been usually expressed by the interested states. Only rarely has the determination of legal rules been left to an impartial tribunal. In view of this it is perhaps not surprising that it should have fallen to the Secretariat to furnish in the first instance many of the legal opinions necessary to the functioning of the other organs. Apart from the International Court of Justice, the Secretariat is the only principal organ which is not composed of representatives of Governments. Its members, like those of the Court, serve in an individual capacity and they are required by the Charter 'not to seek or receive instructions from any Government or from any other source external to the Organization'.[1] Their presentation of legal points, while not authoritative, may nevertheless be considered as 'technical' and non-political.[2] And since, as we have observed, the influence of legal rules in the United Nations rests largely on their impartial authority—that is, on the fact that their validity is independent of the interests of any particular state—there is a need in the Organization to rely, in part at least, upon the ascertainment of legal rules by a non-political body which is not subject to control by any particular government.[3] While, in principle, this is the function of the Court, in practice there is a need for impartial legal advice which can be given at the time a question is under consideration and which does not have the formality of a judicial pronouncement.[4] For these various reasons, the Secretariat has played a significant role in furnishing legal advice to the several organs of the United Nations.

That the Secretary-General is aware of the necessity for objective presentation of legal rules is shown by the fact that his own interventions in important political controversies have almost always been for the purpose of presenting legal statements—witness, his statements in regard to the retention of the *Iranian* case on the agenda,[5] in connexion with the Security Council's assumption of responsibilities under the Statute of Trieste,[6] and

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Council in August 1947 (Report of the Security Council to the General Assembly, 1948. *General Assembly Official Records*, 3rd Sess. Supp. No. 2, pp. 21 ff.); of the Indonesian question at the Security Council in August 1947 (ibid., at pp. 28 ff.).

[1] Art. 100 of the Charter.

[2] The legal work of the Secretariat is performed by its Legal Department which in August 1948 contained twenty-four officers of nineteen different nationalities. For a statement of the functions of the Department see *Year Book of the United Nations*, 1946–7, pp. 631–3.

[3] This point of view is reflected in the discussions which took place in the Sixth Committee during the Second Session of the General Assembly in regard to the resolutions recommending greater use of the International Court of Justice, see *General Assembly, Official Records*, 2nd Session, Sixth Committee, 44th and 45th Meetings, 8, 9 October 1947. See also U.N. Doc. A/C.6/167/Rev.1, 14 October 1947.

[4] Even in the exercise of its advisory functions, the Court acts within recognized judicial limitations. See Art. 68 of the Statute of the Court.

[5] 33rd Meeting of the Security Council, 16 April 1946 (*Journal of the Security Council*, No. 27, pp. 522–4).

[6] 91st Meeting of the Security Council, 10 January 1947 (*Security Council, Official Records*, 2nd Year, No. 3, pp. 44, 45).

in regard to the enforcement of the partition of Palestine.[1] On the first of these occasions, in April 1946, some question was raised in the Security Council regarding the right of the Secretary-General to present a statement on his own initiative. Following upon a consideration of this question by the Committee of Experts, the Council recognized that the Secretary-General may make statements to the Council regarding any matter under consideration.[2] In this case the Secretary-General was not drawing attention to a threat to the peace under Article 99 (as has been erroneously suggested) but merely presenting for the advice of the Council a legal opinion on a question of the interpretation of the Charter. The competence of the Secretariat to furnish legal advice, even in connexion with the controversial political issues before the Security Council, was thus confirmed early in 1946. In less controversial matters it was never questioned; on numerous occasions the Secretariat has been called upon, or has volunteered, to advise an organ or its subsidiary, of the legal position in a particular case. Such opinions, as we have indicated, are purely advisory; they rest, not on any formal authority, but on their intrinsic merits—their legal soundness and persuasive force. It is for the organ concerned to decide whether they are to be accepted.

The determination of legal questions by the Secretariat is not always advisory in character. For there are situations in which the Secretariat may itself be considered as a law-administering organ, required by its duties to ascertain and apply legal rules and procedures. Its duties under the Charter and other international agreements are many and varied; it is a channel of communications, a convenor of international conferences, a registrar of international agreements, a depositary of major treaties and their instruments of ratification, and finally an administrator of international funds, property, and personnel. With respect to all of these functions, legal questions inevitably arise; it is often necessary that they be solved quickly and without delay. Indeed the apparent refusal to make a legal decision with respect to an administrative matter may very well be the equivalent of a determination one way or the other. A good example of this arose in connexion with the partition of British India in 1947 into the two independent Dominions of India and Pakistan. As soon as the Indian Independence Act was enacted the Secretariat was presented with a problem. Would the existing Member state, India, be extinguished by the partition? Should either or both of the newly created dominions be considered as successor to the present Member? These questions were not of an academic nature in relation to the Secretariat; documents had to be circulated, notifications required by treaties had to be transmitted, and invitations to meetings sent out. These administrative functions necessitated a decision on the effect of the Indian Independence Act with respect to membership and representation of India in the United Nations. Accordingly, the Legal Department of the Secretariat, acting at the request of the Secretary-General, prepared a legal opinion on this question.[1] After the announcement of the opinion, the representative of Argentina, in correspondence and in the General Assembly, questioned the right of the Secretariat to determine an issue of this character; this, he said, was a matter for the General Assembly and the Security Council to settle.[2] In consequence, the issue was discussed at the Sixth (legal) Committee of the General Assembly. In response to the suggestion that the Secretariat had acted improperly the Assistant Secretary-General in charge of Legal Affairs stated that 'these questions had to be answered in order for the Secretariat to carry on its normal administrative functions with respect to the Member State concerned'.[3] He noted that even if the Secretary-General did nothing, that in itself would have been a decision. Moreover, he added that the legal opinion could have no effect beyond furnishing guidance for the Secretariat with respect to the functions which it was required to perform; the opinion was not intended to affect in any way the action of the other organs of the United Nations.[4] In the discussion in the Legal Committee several representatives agreed that it was both necessary and proper for the Secretariat to make a decision on this matter in order to carry out its administrative duties.[5] This position may be said to have been tacitly adopted by the Committee since in its report it raised no question as to the propriety of the action by the Secretariat.[6]

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[1] U.N. Doc. A/AC.21/13, 9 February 1948 (Paper submitted to U.N. Palestine Commission).

[2] Rule 22 of the Provisional Rules of Procedure of the Security Council (U.N. Doc. S/96/Rev.3).

There are, accordingly, two broad categories of legal opinion of the Secretariat: (1) those which are purely advisory and submitted for the guidance of another body; and (2) those which have direct legal effect in that they relate to matters with respect to which the Secretariat has the authority to make administrative decisions. Whether an opinion is advisory or has legal effect is usually apparent from the circumstances in which it was given; it does not seem necessary, therefore, to introduce this classification into our discussion of the particular opinions. Both advisory and 'decisive' opinions may deal with the same subject and it is more useful, on the whole, to group the opinions in accordance with their subject-matter.

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[1] The opinion was issued as U.N. Press Release, P.M. 473, 12 August 1947. See below, p. 102.

[2] Statement made by the Representative of Argentina at the 59th Meeting of the First Committee of the General Assembly on 24 September 1947 (U.N. Doc. A/C.6/156). Also see summary record of the 59th Meeting A/C.1/SR.59, 24 September 1947.

[3] Statement by Dr. Ivan Kerno to the Sixth Committee, U.N. Doc. A/C.6/146.

[4] Ibid. See also statement of Mr. A. H. Feller at the 43rd Meeting of the Sixth Committee on 7 October 1947 (U.N. Doc. A/C.6/SR.43, 8 October 1947 at p. 5).

[5] See U.N. Doc. A/C.6/SR.43, 8 October 1947 at pp. 1 ff.

[6] The statement by the Rapporteur of the Sixth Committee (Dr. Kaeckenbeeck) observed that the Secretary-General had acted properly in carrying out his responsibility: 'The case was one in which inaction implied consequences no less serious than action' (U.N. Doc. A/C.6/162, 6 October 1947). The Committee members generally expressed approval of the Rapporteur's statement (U.N. Doc. A/C.6/SR.43, 8 October 1947).

In selecting the particular subjects for discussion in this article, primary consideration has been given to their significance in the development of the law of the United Nations. As might be expected the great majority of Secretariat opinions, like those of courts and of law offices, concern special points of law having limited application; most frequently, they relate to interpretation of the procedural rules or of the particular resolutions of an organ of the United Nations. The following topics have been selected for detailed consideration in this article:

1. The development of the residuary power of the Security Council (Section III);
2. The effect of territorial and constitutional changes on the status of a Member (Section IV);
3. Recognition of new States (Section V);
4. The position of states which are not Members of the United Nations (Section VI);
5. Reservations to multipartite treaties (Section VII);
6. The scope of the obligation to register treaties (Section VIII).

III. *The development of the residuary power of the Security Council*

In his illuminating comparison of the Covenant and the Charter, Professor Brierly observed that 'the Covenant did not need to cramp the future activities of its organs by minute definitions of their respective functions; it could say quite generally that either the Assembly or the Council was able to "deal with any matter within the sphere of action of the League or affecting the peace of the world".... The Scheme of the Charter had to be exactly the reverse of this.'[1] The problem foreseen by Professor Brierly's comment arose in the Security Council in January 1947. Stated in general terms, the Council was faced with the following question: in carrying out its responsibility for the maintenance of international peace and security, is the authority of the Council limited to the exercise of the specific powers granted in Chapters VI, VII, VIII, and XII of the Charter?

This issue was raised as a consequence of the arrangements for a free territory of Trieste which had been agreed upon by the Council of Foreign Ministers after prolonged discussion. Under these arrangements (which were embodied in various Annexes to the draft peace treaty with Italy),[2] the

[1] Brierly, 'The Covenant and the Charter', in this *Year Book*, 23 (1946), p. 86.

[2] Art. 21 of the Peace Treaty with Italy provides for the creation of the Free Territory of

Security Council was to assume important responsibilities in regard to the Free Territory; in particular, it was to: (*a*) ensure the integrity and independence of the territory;[1] (*b*) appoint the Governor who would be responsible to the Council and subject to its instructions;[2] (*c*) determine when the Permanent Statute shall enter into force;[3] (*d*) have the right to amend the Permanent Statute.[4] The Council of Foreign Ministers (which for this purpose included the representatives of France, the U.S.S.R., the U.K., and the U.S.A.) requested the Security Council to approve the instruments relating to Trieste and to accept the responsibilities which would devolve upon it under them.[5]

At the Security Council meeting two of the representatives raised a question as to the authority of the Council to accept these responsibilities.[6] While they did not doubt that the question of Trieste related to peace and security they maintained that the Council's responsibility could only be exercised through the specific powers granted for that purpose in Chapters VI, VII, VIII, and XII. In their opinion the specific powers did not confer upon the Council sufficient authority under the circumstances to enable it to exercise the governmental functions stipulated in the Trieste documents. In response to this contention the Secretary-General presented a brief oral statement to the Council expressing his views regarding the constitutional issue raised.[7] In his opinion the Security Council was not limited to the specific powers laid down in the chapters mentioned; the Council had, he suggested, a power to maintain peace and security conferred upon it by Article 24 which is wide enough to enable it to assume the responsibilities arising from the agreements relating to Trieste. In support of this conclusion the Secretary-General drew attention to the discussion which took place at a committee meeting in San Francisco[8] in regard to a proposed amendment to limit the binding effect of Council decisions solely to the

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Trieste and provides further that this territory shall be governed in accordance with an instrument for a Provisional Régime drafted by the Council of Foreign Ministers and approved by the Security Council until such date as the Security Council shall fix for the coming into force of the Permanent Statute. The Free Territory will then be governed by the provisions of the Permanent Statute. The text of the Permanent Statute is contained in Annex VI to the Peace Treaty and the instrument for the Provisional Régime in Annex VII. There is also an instrument for the Free Port of Trieste which is in Annex VIII.

[1] Art. 21 of the Peace Treaty with Italy and Art. 2 of the Permanent Statute.

[2] Arts. 11 and 17 of the Permanent Statute.

[3] Art. 38 of the Permanent Statute.

[4] Art. 37 of the Permanent Statute.

[5] Letter from the Chairman of the Council of Foreign Ministers to the Secretary-General dated 12 December 1946. U.N. Doc. S/224/Rev.1, 31 December 1946 (*Security Council, Official Records*, 2nd Year, Suppl. No. 1).

[6] 89th Meeting of the Security Council, 7 January 1947 (*Security Council, Official Records*, 2nd Year, No. 1, pp. 5–9).

[7] 91st Meeting of the Security Council, 10 January 1947 (*Security Council, Official Records*, 2nd Year, No. 3, pp. 44, 45).

[8] Summary Report of the 14th Meeting of Committee III/1, 25 May 1945 (*U.N.C.I.O.* Doc. 597).

decisions made under the specific powers. He noted that this discussion bore on the problem before the Council since it revealed that all the delegations which expressed their views, whether for or against the amendment, recognized that Council decisions were not restricted to those made under the specific powers.[1] Moreover, by rejecting the amendment it was made clear that the Members were obliged under Article 25 to accept those decisions which were not made under the grant of the specific powers. In the view of the Secretary-General this discussion reflected a basic conception of the Charter, namely, that the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.[2]

The conclusion of the Secretary-General that the Council may rely on Article 24, without reference to its specific powers, appeared to be accepted by almost all of the Members of the Council as the legal basis of their decision to assume the responsibilities relating to Trieste.[3] The only dissent was expressed by the Australian representative who maintained his position that the Council could act only through its specific powers. He also added that even granting a general power under Article 24, that power would not reasonably support the assumption of governmental functions in Trieste.[4]

Although the Trieste decision was the first clear case in which the Council did not rely upon its specific powers, a similar theory had been advanced to justify the Council's retention of the *Iranian* case on its agenda after the complaint had been withdrawn by Iran. On that occasion it had been suggested by certain delegations and by the Secretary-General that since the Council had been seized of the dispute by virtue of Iranian complaint under Article 35, paragraph 1, the withdrawal of that complaint meant that the dispute no longer existed and consequently that the necessary conditions for Council action were not present.[5] It was recognized by the Secretary-General that the Council still had the right to vote an investigation under Article 34 or to invoke Article 36, paragraph 1, after deciding that a dispute exists under Article 33 or a situation of like nature. But the Secretary-General suggested that unless the Council proceeded to exercise its powers under these Articles it could not remain seized of the dispute after the complaint had been withdrawn.[1] This view was rejected by the Security Council[2] on the basis of a report from its Committee of Experts. The majority of the Committee observed that the Secretary-General's opinion had put the problem on 'too narrow a basis since it referred only to a dispute and since it treated such a dispute merely as a law-suit between two parties'.[3] The report then noted that the problem should not be considered from a legalistic point of view since 'the Charter has in fact invested the Security Council especially under Article 24 with certain political functions of primordial importance by conferring on it the primary responsibility for the maintenance of international peace and security'.[3] Consequently, the Security Council may hold that, even after agreement has been reached between the parties, circumstances may continue to exist which 'might still leave room for fears regarding the maintenance of peace' and hence which justify retaining the item on the agenda.[3]

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[1] The following Delegations appeared to agree with this conclusion: Belgian, Canadian, U.K., U.S.S.R., and Australian (U.N.C.I.O. Doc. 597).

[2] *Security Council, Official Records*, 2nd Year, No. 3, p. 45.

[3] At the 89th Meeting the British and Soviet representatives expressly referred to Art. 24 as the basis of the Council's authority. The representatives of France and the U.S. concurred in this opinion.

[4] *Security Council, Official Records*, 2nd Year, No. 3, p. 56.

[5] 33rd Meeting of the Security Council, 16 April 1946 (*Journal of the Security Council*, No. 27, pp. 522–4, 526, 528).

It has been suggested[4] that these observations of the Committee of Experts assert, in effect, that the authority of the Council under Article 24 is of such fundamental importance as to be superior to any limitations found in the specific provisions of the later chapters. This view, if it were in fact adopted, would give Article 24 an effect considerably beyond that suggested in the *Trieste* case. For in that case, it will be recalled, there was no question of overriding the specific provisions of the Charter; Article 24 was suggested only as the basis of authority enabling the Council to assume certain responsibilities which were not covered by the particular provisions. It is, however, questionable whether the majority of the Council or of the Committee of Experts in the *Iranian* case intended to go beyond this, even though they used sweeping language in regard to Article 24. These delegates did not consider the retention of the *Iranian* case on the agenda as in any way contrary to the specific provisions of Chapter VI. Indeed, several of them suggested these very provisions as grounds for the Council's retention of the item on the agenda.[5] It therefore seems reasonable to conclude that they invoked Article 24 only to meet a possible procedural lacuna in Chapter VI. On this interpretation, the position in the Iranian case, like that in regard to Trieste, is not that Article 24 empowers the Council to disregard the specific provisions,[6] but rather that it is a source of residuary authority which can be drawn upon to meet situations which are not covered by the more detailed provisions.

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[1] Ibid., at p. 523.

[2] 36th Meeting of the Security Council, 23 April 1946 (*Journal of the Security Council*, No. 30).

[3] Report of Chairman of the Committee of Experts of the Security Council dated 18 April 1946 (U.N. Doc. S/42, p. 2).

[4] See Eagleton, 'The Jurisdiction of the Security Council over Disputes', in *A.J.* 40 (1946), p. 526.

[5] See report of Committee of Experts, U.N. Doc. S/42 at p. 43. For example, the view was expressed that the Security Council does not have to take a formal decision to 'investigate' under Art. 34, and that it has discretion to keep a dispute under consideration without taking that formal decision (*Journal of the Security Council*, No. 30, at p. 589).

[6] But cf. Eagleton, op. cit., at p. 531, who suggests that the Council's position in the *Iranian*

This view is further confirmed by a legal opinion[1] submitted by the Secretary-General in regard to the Palestine question. On that occasion, the General Assembly's Commission had requested an opinion on the powers of the Security Council to accept the responsibilities assigned to it by the General Assembly with respect to the implementation of Palestine partition. In his opinion the Secretary-General recognized that there are no specific provisions of the Charter which authorize the Council to accept responsibilities such as those involved in the carrying out of the partition plan. But he drew attention to his earlier opinion on the Trieste problem and concluded that by its decision in that case the Council 'recognized the principle that it has sufficient power, under the terms of Article 24 of the Charter, to assume new responsibilities, on condition that they relate directly or even indirectly to the maintenance of international peace and security, and that in discharging these duties, the Security Council acts in accordance with the purposes and principles of the United Nations (Articles 1 and 2 of the Charter)'.[2] He also observed that if the Security Council considered that it was within its competence to accept responsibilities for the carrying out of provisions of a treaty negotiated outside of the United Nations, it was still more appropriate that it should accept responsibilities for the implementation of a plan adopted by the General Assembly.[3]

It may possibly be inferred from this last statement that in the view of the Secretariat the resolution of the General Assembly added to the power of the Security Council in regard to the partition plan. It is doubtful whether this was the intention. In view of the prevailing opinion that a General Assembly recommendation does not have binding force,[4] the reference to the Assembly resolution as an 'appropriate' reason for accepting responsibilities would appear to be more of an argument of policy than a suggestion that it is a legal source of power. Moreover, a reading of the entire opinion of the Secretariat indicates that in substance it rests on the principle of the *Trieste* case, namely, that the Council may rely on its residuary power under Article 24 in order to maintain peace and security. On this interpretation, the test is whether Council action is necessary for peace and security; the fact that the Assembly has passed a resolution would have significance

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case would, if accepted as stated, 'eliminate the need for any other provisions in the Charter with regard to peace and security'.

[1] U.N. Doc. A/AC.21/13, 9 February 1948 (working paper prepared by the Secretariat for the United Nations Palestine Commission in accordance with the request made by the Commission at its 13th Meeting).

[2] Ibid., at p. 6.

[3] Ibid., at p. 7.

[4] In regard to this problem see Sloan, 'The Binding Force of a Recommendation of the General Assembly of the United Nations', in this *Year Book*, pp. 1–33.

only in so far as it might be regarded as persuasive evidence of such necessity.[1] In this respect, it would perform essentially the same function as the decision of the Council of Foreign Ministers in regard to Trieste.

Although this legal opinion in regard to Palestine added little to the reasons previously stated in the *Trieste* case, it is a further indication that Article 24 is being construed as a grant of authority which is quite separate and distinct from the specific powers granted elsewhere. Moreover, it appears to have been accepted that the action taken by the Council under this residuary power may be considered as creating binding obligations under Article 25.[2] Whether or not this interpretation is justified by the text, it seems likely, on the basis of the precedents already established, that the Council will be prepared to fall back on Article 24 as a general source of authority. But this does not mean that Article 24, broad though it is in its language, will be considered as giving the Council a *carte blanche* in matters of peace and security. In the first place it is clear from the text of paragraph 2 of this Article that the Council's power is limited by the purposes and principles set forth in Articles 1 and 2. In the second place the cases which have been analysed in this article indicate that Article 24 has not actually been utilized as a substitute for the more specific provisions of the Charter; it has rather been regarded as a reservoir of authority, to be invoked only in those cases which, like Trieste, relate to peace and security but which do not fall within the framework of the more detailed provisions of the Charter. It may be expected that this limitation will be more precisely defined by future developments.

If limited in this manner, the interpretation of Article 24 as conferring residuary power would seem to be a justifiable constitutional development, in keeping with the basic principle that the Council should have broad and flexible authority, within the purposes and principles of the Organization, to act effectively in the varied circumstances which might involve threats to the peace.

IV. *The effect of territorial and constitutional changes on the status of a Member of the United Nations*

In August 1947 India, an original Member of the United Nations, underwent a transformation of a fundamental character: its territory was split into two parts; two new dominions were formed; a constitutional change involving a transfer of sovereignty was effected.[1] This development, as we have already seen,[2] raised a problem which the Secretariat was required to answer by virtue of its administrative functions. In substance, the following questions were presented: (1) Did the division of India result in the extinction of the existing Member state? Was it, in legal effect, a 'dismemberment' or merely a secession or breaking away of a part of the state? (2) What consequences did the constitutional change, the transfer of sovereignty, have on the status and representation of the Member state? (3) What was the status of the new state, Pakistan? Did it succeed to the rights and obligations of a Member under the Charter?

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[1] Cf. statement of the representative of the United States (Mr. Austin) at the 253rd Meeting of the Security Council, 24 February 1948 (U.N. Doc. S/PV/253, p. 32).

[2] This point was affirmed in the Secretary-General's opinion on Trieste, op. cit., *supra*. In this connexion the opinion assumes, of course, that the action of the Council under its residual authority is not merely a 'recommendation' such as that made under Arts. 36, 37, or 38, but that it is, in fact, a decision of the Council intended to have binding effect. For a statement as to the non-obligatory character of recommendations under Art. 36, see 'individual' opinion of seven judges in the *Corfu Channel* case, Preliminary Objection, *I.C.J. Reports*, 1947–8, pp. 31–2.

These questions were answered in a brief opinion of the Assistant Secretary-General in charge of the Legal Department.[3] The opinion assumed that, from the legal standpoint, the partition of India did not constitute a dismemberment; it was said to be rather a situation in which 'part of an existing state breaks off and becomes a new state'.[4] On this analysis, the opinion continued, there was no change in the international status of India; it continued as a state with all treaty rights and obligations and consequently with all the rights and obligations of membership in the United Nations. The opinion did not analyse the facts in the Indian situation but merely drew attention to what it considered the analogous situations involved in the separation of the Irish Free State from Great Britain and of Belgium from the Netherlands. In these cases, it was observed, the portion which separated was considered a new state and the remaining portion continued as an existing state with all of the rights and duties which it had before.

With respect to the constitutional transformation, the opinion noted that the state of India had become a Dominion and accordingly had acquired a new status in the British Commonwealth of Nations, independence in external affairs, and a new form of government.[5] But, it was concluded, this basic constitutional change did not affect the international personality of India or its status in the United Nations. The only question which it raised was whether new credentials should be requested for the Indian representatives in the organs of the United Nations. The opinion observed that there was no precedent for this situation in the United Nations but suggested that there was 'some basis in diplomatic practice for requesting new credentials in cases of States which have undergone a change of sovereignty as from a monarchy to a republic'.[1] It concluded, therefore, that it would be appropriate for the Secretary-General to suggest to the Government of India that in view of the change of sovereignty it would be desirable to have new credentials issued to the Indian representatives by the head of the Government or the Foreign Minister of the new Dominion of India.

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[1] Indian Independence Act, 1947. See, in particular, sections 1, 6, 7, and 18.

[2] *Supra*, section II.

[3] The opinion was issued as U.N. Press Release PM/473, 12 August 1947. See *The New York Times*, 13 August 1947 (under heading 'Pakistan is Ruled New State by U.N.').

[4] Ibid. See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), pp. 152, 160.

[5] Although India had been a member of the League of Nations and, in conformity with Art. 3 of the Charter, was a 'state' for the purpose of original membership, the ultimate control of its internal and foreign affairs was in the British Government and Parliament prior to the Independence Act of 1947 (Bose, *The Working Constitution in India* (1939), pp. 15 ff.).

In summary, the Secretariat opinion reached the following conclusions as to the effect of the Indian Independence Act on the membership and representation of India in the United Nations:

1. The new Dominion of India continues as an original Member with all its rights and obligations.
2. Pakistan becomes a new non-Member state. In order for it to become a Member it would have to apply for admission under Article 4 of the Charter and its application would then be considered in accordance with the relevant rules of procedure of the General Assembly and the Security Council.
3. The representatives of India should be requested to submit new credentials issued by the head of the Government or the Foreign Minister of the new Dominion.

Following the issuance of the opinion of the Secretariat, the Indian Independence (International Arrangements) Order,[2] 1947, was promulgated, providing, *inter alia*, that membership of all international Organizations will devolve solely upon the Dominion of India, with Pakistan free to apply for membership in such organizations as it chooses to join. This Order had the effect of an agreement duly made between the Dominion of India and the Dominion of Pakistan.[3] Notwithstanding the agreement of the two states directly concerned, the conclusions reached in the Secretariat opinion were subsequently subjected to criticism during the Second Session of the General Assembly.[4] The representative of Argentina maintained at that time that the division of India into two new Dominions effected the 'disappearance' of the existing Member state and consequently that it was not proper as a legal matter to conclude that one of the two new states should be considered as the successor.[5] Both Dominions, it was asserted, should be treated equally; either both should be regarded automatically as Members from the date on which they acquired sovereignty or, if regarded as new states, both should be required to be admitted under the procedure laid down by the General Assembly and the Security Council. The decision taken, the representative of Argentina concluded, resulted in 'unjustifiable discrimination against Pakistan'.[1]

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[1] U.N. Press Release PM/473, 12 August 1947, p. 2. This statement is supported by Hackworth, *Digest of International Law*, vol. iv (1942), p. 439.

[2] Section 2 of the Schedule to Indian Independence (International Arrangements) Order, 1947. This order is reproduced as Annex I of U.N. Doc. A/C.6/161, 6 October 1947, p. 3.

[3] Ibid., particularly clause 2 of the Order.

[4] Summary Record, 59th Meeting of the First Committee, 24 September 1947 (U.N. Doc. A/C.1/SR.59).

[5] The complete statement of the Argentinian representative was reproduced in U.N. Doc. A/C.6/156, 2 October 1947.

In view of the position maintained by the Argentinian representative, the First Committee requested the Legal Committee to express its views with respect to the 'legal rules to which in the future a State or States entering into international life through the division of a Member State should be subjected'.[2] It was stated that the opinion of the Legal Committee would be 'for use in future cases and had no application to the present case'.[3] However, at the Sixth Committee, several representatives stressed the undesirability of laying down rules for hypothetical cases; in their view whether a partition was to be considered a dismemberment or secession could not be decided in abstract but required consideration of the particular circumstances.[4] There was acceptance, in the end, of certain general principles, as formulated by the rapporteur,[5] and on that basis the Legal Committee informed the General Assembly that it agreed on the following formulation:[6]

> '1. That, as a general principle, it is in conformity with legal principles to presume that a State which is a member of the organization of the United Nations does not cease to be a member simply because its constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
>
> '2. That when a new state is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.
>
> '3. Beyond that, each case must be judged according to its merits.'

While these principles justify the position taken by the Secretariat in regard to the partition of India, they offer only the most general guidance for future cases. It may therefore be of interest to review the question in order to ascertain what more specific criteria might be applied in the future and what limitations may be imposed on the principles formulated by the Legal Committee and implicit in the Secretariat opinion.

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[1] U.N. Doc. A/C.6/156, 2 October 1947, at p. 7.

[2] Letter from the Chairman of the First Committee to the President of the General Assembly, dated 25 September 1947 (U.N. Doc. A/C.6/145, 26 September 1947).

[3] Ibid., at p. 2.

[4] Summary Record of the 43rd Meeting of the Sixth Committee, 7 October 1947 (U.N. Doc. A/C.6/SR.43, 8 October 1947).

[5] See statement of the Rapporteur (Dr. G. Kaeckenbeeck) in U.N. Doc. A/C.6/162, 6 October 1947.

[6] U.N. Doc. A/C.1/212, 11 October 1947 (Letter from Chairman of the Sixth Committee to the Chairman of the First Committee).

The first question relates to the effect of territorial change. It is, of course, well recognized that, in general, neither losses of territory nor additions thereof have any legal effect on a state's continuity as an international juridical entity or on its treaty rights and obligations.[1] Notable examples of extensive losses of territory include those of Spain in the eighteenth century, of Turkey in the nineteenth and twentieth centuries, and of Russia and Germany at the end of the First World War; in none of these cases did the reductions in domain affect the legal personality of the state in international law.[2] It has, however, been suggested that the legal identity of a state would be destroyed if it lost certain essential portions of its territory such as its seat of government or its original territorial nucleus.[3] There are no clear cases of changes of this type although it has been maintained by some that the loss of Belgian territory had the effect of destroying the old state of Holland.[4] In the light of the precedents, the division of India should have offered little basis for controversy; for it was quite clear that the territory lost could not be regarded as essential to the identity of the state. In fact, as the Indian representative pointed out,[5] the new Dominion of India retained three-fourths of the territory, two-thirds of the population, the seat of government, virtually the same governmental machinery, and the same name.

In one respect, the Secretariat opinion appears to require some qualification—namely, in regard to its *obiter dictum* that India would retain 'all treaty rights and obligations'.[6] This statement would seem to be too broad since it is entirely conceivable that certain treaties may involve obligations which relate particularly to the territory which has been lost and consequently cannot be discharged when that area no longer remains within the state. This, for instance, would be the case of a treaty concerned with riparian or mineral rights connected with the ceded territory. Similarly, it has even been suggested[7] that the cession of a territory from which a state obtains extensive revenues could render impossible the carrying out of that state's financial obligations and hence justify non-performance on the ground of impossibility. These considerations suggest a more cautious statement of the rule regarding the continuity of treaty rights and obligations.

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[1] Oppenheim, op. cit., *supra*, at p. 149. See 'Harvard Research, Draft Convention on the Law of Treaties', *A.J.* 29 (1935), Supplement, pp. 1068 ff.; Feilchenfeld, *Public Debts and State Succession* (1931), *passim*.

[2] Of course, total loss of territory, as by annexation or dismemberment, extinguishes a state: see Oppenheim, op. cit., *supra*, at p. 150. See also McNair, *The Law of Treaties* (1938), pp. 412 ff., which considers under the rubric of 'political dismemberment' the cases of Colombia in 1829–31, Muscat in 1856, Sweden–Norway in 1905, and Austria-Hungary in 1918.

[3] Hall, *International Law* (8th ed., 1924), p. 22.

[4] This view was taken by Kiatibian, *Conséquences Juridiques des Transformations Territoriales des Etats sur les Traités* (1892), pp. 64, 74 (cited in *Harvard Research*, op. cit., *supra*, at p. 1070). But this is the view of the minority of writers. See Feilchenfeld, op. cit., *supra*, at p. 208.

[5] Summary Record of the 43rd Meeting of the Sixth Committee, 7 October 1947 (U.N. Doc. A/C.6/SR.43, 8 October 1947, p. 1).

[6] U.N. Press Release PM/473, 12 August 1947, p. 1.

[7] *Harvard Research*, Draft Convention on the Law of Treaties, *A.J.* 29 (1935), Supplement, p. 1070.

Another aspect of the problem of succession of rights and duties is presented by the agreement between India and Pakistan relating to international arrangements. It is provided in this agreement that both India and Pakistan succeed to the rights and obligations under all of the international agreements to which India has been a party, with the exception of membership in international organizations and agreements which apply exclusively to the territory of only one of the dominions.[1] The intended effect of this provision appears to be to extend to Pakistan treaty rights and duties which would not devolve upon it under the generally accepted rule of law. For it has been recognized that when a territory breaks off and becomes a state, succession takes place only 'with regard to such international rights and duties of the predecessor as are locally connected with the part of the territory ceded or broken off, and with regard to the fiscal property found on that part of the territory'.[2] Conversely, it has been clear that no succession occurs in regard to rights and duties of the old state which arise from its political treaties such as treaties of alliance or of pacific settlement.[3] It has also been the view of the majority of writers that the new state does not succeed to other non-local agreements, such as treaties of commerce and extradition.[4]

In view of these principles, what effect must be given to the bilateral agreement between the two dominions purporting to transfer to the new state all treaty rights and obligations? It may be doubted that it will be given effect (even if intended) with respect to agreements which are essentially political, since both precedent and principle are contrary to recognizing succession in these matters.[5] On the other hand, it does not appear improbable that succession will be recognized with respect to multipartite treaties concerned with social, economic, and technical matters. As an indication of this development, it may be observed that the Secretariat, as depositary, raised no objection to Pakistan signing the protocols providing for the transfer of functions under the Convention for the Suppression of Traffic in Women and Children of 1921 and under the Convention on Obscene Publications of 1923.[6] Since these protocols were open only to parties to the conventions, Pakistan submitted a declaration stating that it considered itself a party to these conventions 'by the fact that India became a party to the above-mentioned international conventions before the 15th day of August, 1947'.[1] Although the conventions in question cannot be regarded as local or territorial, they are essentially non-political agreements intended to have universal application; accordingly, it does not seem unreasonable to extend the rule regarding succession by new states to such treaties.

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[1] Indian Independence (International Arrangements) Order of 1947 (U.N. Doc. A/C.6/161, 6 October 1947). This Order is, of course, *res inter alios acta.*

[2] Oppenheim, op. cit., *supra*, p. 160.

[3] Hall, op. cit., *supra*, pp. 114 ff.

[4] Ibid. See also McNair, op. cit., ch. 37, pp. 450 ff.

[5] See Hall, op. cit., *supra*, p. 114, for statement of reasons underlying rule regarding succession.

[6] See General Assembly Resolution No. 126 (II) of 20 October 1947.

Finally, a few comments may be appropriate in regard to the effect of constitutional changes. The general rule is quite clear: changes in governmental organization or constitutional system do not affect the continuity of a state in international law[2] or its rights and obligations under treaties.[3] It was on the basis of this rule that the Legal Committee concluded that a state does not cease to be a Member simply because its constitution has been subjected to changes and that its extinction must be shown before its rights and obligations can be considered to have ceased to exist.[4] There can be no disagreement with this conclusion as a general principle but attention may perhaps be drawn to the exceptional situation in which the internal change is of such a character that the new order within the state must be considered incompatible with the principles and purposes of the Charter. There is a substantial body of opinion which holds that revolutionary developments within a state, which transform its basic political, economic, and social organization, may have the effect of abrogating certain of that state's rights and duties under existing treaties.[5] This view has usually been described as a specific application of the *clausula rebus sic stantibus*.[6]

Assuming that this position is accepted, under what circumstances would it affect a Member's rights and duties under the Charter? It seems clear that it would not in itself give rise to a right in the other Members to terminate the membership of the state which has undergone the revolutionary change. For the only way under the Charter to terminate membership against the will of a Member is by expulsion under Article 6 on the ground of persistent violations of the Principles of the Charter.[7] If the internal change does, in fact, lead to such persistent violations, it would constitute the basis for expulsion provided that both the Security Council and the General Assembly saw fit to take such action.

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[1] Declaration accompanying signature of representative of Pakistan to the above-mentioned protocols which are deposited with the Secretariat of the United Nations.

[2] Oppenheim, op. cit., *supra*, p. 148; Hall, op. cit., *supra*, pp. 22, 23; Moore, *Digest of International Law*, vol. i (1906), p. 249.

[3] *Harvard Research*, loc. cit., *supra*, pp. 1046 ff.

[4] U.N. Doc. A/C.1/212, 11 October 1947.

[5] See *Harvard Research*, loc. cit., *supra*, pp. 1051 ff.; Oppenheim, op. cit., *supra*, p. 148, n. 2. With reference to the effect of the Russian Revolution on the treaties of Czarist Russia, both Soviet and non-Soviet authorities may be found in support of the principle that certain agreements have been abrogated. See Korovin, 'Soviet Treaties and International Law', in *A.J.* 22 (1928), p. 763; Mirkine-Guetzévitch, 'Les Traités Internationaux de l'Etat Soviétique', in *Revue de Droit International*, 2 (1931), pp. 1012 ff.

[6] Korovin, loc. cit., *supra*; *Harvard Research*, loc. cit., *supra*, p. 1054.

[7] Goodrich and Hambro, *Charter of the United Nations* (1946), pp. 86 ff.

A second and more difficult question is whether the Member itself has the right to terminate its membership voluntarily as a consequence of a change in its governmental principles. The position taken in a Committee report approved by the San Francisco Conference is that a Member has the right to withdraw because of 'exceptional circumstances'.[1] Since no organ has been authorized to determine whether exceptional circumstances exist, it has been suggested that the question is left to the decision of the Member itself; in effect, this means that the state may withdraw at will.[2] Under this interpretation, the circumstance of governmental change would have only slight, if any, legal significance, though it may conceivably serve as a basis of a justification directed toward world opinion.[3] If, on the other hand, the interpretation of a unilateral right of withdrawal is not acccepted as authoritative,[4] the only possible basis for withdrawal would be the principle of *rebus sic stantibus*. Assuming that this doctrine may be applied in regard to the Charter, the question would then be presented as to whether the internal constitutional change constituted a 'vital change of circumstances' sufficient to justify that state in demanding to be released from the obligations of the Charter. Without attempting to speculate as to the nature of the change that might support the application of the doctrine of *rebus sic stantibus*, it is evident that unless all of the other Members consent to withdrawal, the question would have to be submitted to impartial adjudication.[5] If this is not done, and the decision is left to the interested party, the factor of changed conditions is of little consequence since the Member is, in effect, permitted to withdraw at will. However, if the decision as to the effect of the change of circumstances is made subject to impartial review, then the application of the principle of *rebus sic stantibus* might be considered as a reasonable middle way between perpetual membership, on the one hand, and the unqualified right of withdrawal, on the other. This would appear to be closer to the intent of the framers of the Charter than the interpretation that a Member is entirely free to withdraw if it wishes to do so.[1]

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[1] Report of the Rapporteur of Committee I/2 on Chap. III, Membership, 24 June 1945 (U.N.C.I.O. Doc. 1178, p. 5).

[2] This view is supported by several Members of the United States Delegation at San Francisco. See *Hearings before the Committee on Foreign Relations, U.S. Senate, 79th Congress, 1st Session, on the Charter*, p. 647 (Mr. Dulles), pp. 232 ff. (Senator Connally and Mr. Pasvolsky), p. 347 (Mr. Hackworth). See also Goodrich and Hambro, op. cit., p. 88.

[3] Ibid., p. 237 (Statement of Senator Vandenberg).

[4] Professor Kelsen has maintained that the Committee report relating to the right of withdrawal may not be considered as an authentic interpretation of the Charter and is without legal effect (Kelsen, 'Withdrawal from the United Nations', in *Western Political Quarterly*, vol. i (1948), p. 1).

[5] In support of the justiciability of disputes involving the application of the doctrine *rebus sic stantibus*, see Lauterpacht, *The Function of Law in the International Community* (1933), pp. 280 ff.

V. *The recognition of new states*

In a document[2] issued in October 1947, as one of a series entitled 'Communications received by the Secretary-General from Non-Governmental Organizations', there was listed a letter from the 'Democratique République du Viet Nam'; it was stated that the letter forwarded a memorandum concerning the situation in Indo-China. No other comment appeared, but we must infer from this brief reference that the Secretariat took the position that the Democratic Republic of Viet Nam should not be considered as a state and consequently that its communication would be treated as 'non-governmental'. Notwithstanding the absence of a legal opinion, it appears worth while to consider this decision in some detail; for, by analysing it in the light of the circumstances we may not only detect its implicit legal principles but also perhaps shed some light on the problem of collective 'recognition' in the United Nations.

Before considering the particular circumstances, it should be noted that the question presented by the letter was one which fell, in the first instance, within the administrative functions of the Secretariat. For when a communication is received which purports to come from a government and which pertains to a matter of peace and security it is necessary that the Secretariat make one of the following choices: first, it may be satisfied that the communication is from a state and, therefore, under the pertinent rule of procedure of the Security Council,[3] bring the communication to the attention of representatives on the Council; second, it may decide that the communication is not from a state and accordingly treat it as a non-governmental communication (as in the case of Viet Nam); or lastly, it may consider that the Secretariat is not in a position for one reason or another to make the determination as to status and consequently it is obliged to refer the matter to the Council or other appropriate organ.[1]

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[1] According to the report of the U.S. Delegation to the President on the San Francisco Conference, the Conference rejected the principle of the League Covenant which 'recognized withdrawal as an absolute right which any Member could exercise for any reason, or even without reason—Under the present Charter, withdrawal is permissible but it will have to be justified' (p. 61 of *Hearings before the Committee on Foreign Relations*, loc. cit., *supra*). See also statement of Representative Eaton that the 'possibility of withdrawal would have to be determined in any particular case in the light of the surrounding circumstances at the time' (ibid. at p. 60). At the 28th Meeting of Committee I/2, 17 June 1945, the Delegate of Belgium observed that a decision permitting withdrawal in extraordinary circumstances would be based on the principle of *rebus sic stantibus* (U.N.C.I.O. Doc. 1086, p. 2). This view was concurred in by the representative of the United Kingdom (ibid., p. 3).

[2] U.N. Doc. SG/CRO/46, dated 8 October 1947.

[3] Rule 6 of the Provisional Rules of Procedure of the Security Council requires that Secretary-General 'shall immediately bring to the attention of all representatives on the Security Council all communications from States, organs of the United Nations, or the Secretary-General concerning any matter for the consideration of the Security Council in accordance with the provisions of the Charter' (U.N. Doc. S/96).

The pertinent facts regarding Viet Nam may be stated briefly. The Democratic Republic of Viet Nam proclaimed its independence on 19 August 1945; a provisional Government was established and negotiations undertaken in order to conclude an agreement with France.[2] On 9 November 1946 a constitution was promulgated which provided for unlimited sovereignty of the Republic with respect to both domestic and foreign relations.[3] In December 1946 hostilities between France and Viet Nam were resumed and were in progress at the time of the Secretariat decision. It also appeared at that time that the 'Republic' probably had *de facto* control over some portions of Indo-China, but that it had not been recognized—either *de jure* or *de facto*—by any state.[4] One further fact regarding the Secretariat decision should be mentioned: the Secretariat apparently did not consider it necessary to make any inquiry into the independence or effective governmental authority of the 'Republic'.

What conclusions may be drawn from these facts? In the first place we may infer that the Secretariat rejected (at least implicitly) the declaratory view of recognition. For, according to the declaratory view the existence of a state is solely a question of fact—that is, of whether the community does actually meet the conditions of statehood laid down by international law;[5] it is entirely independent of recognition by other states.[6] If the Secretariat were to act in conformity with this view it would itself have to ascertain the pertinent facts (such as independence, effective control, and territory) or refer these factual questions to another authority. Needless to say, these questions do not admit of *a priori* answers; indeed, in the case of Viet Nam they referred to a complicated and controversial situation and certainly could not be answered without some investigation. But since the Secretariat neither undertook its own inquiry nor referred the matter to any other organ, it may be assumed that it considered these questions as immaterial to its own decision.

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[1] This was done, for example, in regard to a communication from the Hyderabad Government dated 21 August 1948 regarding its dispute with India. In his note to the Security Council, the Secretary-General stated that he was not in a position to determine whether he is required by the rules of procedure to circulate this memorandum (U.N. Doc. S/986, 24 August 1948). Under the circumstances, it may be assumed that the Secretary-General felt he could not determine whether Hyderabad was a state within the meaning of the Council Rules of Procedure.

[2] Viet Nam News Service, 29 December 1947, p. 4 (Viet Nam–American–French Association, Inc.). On 6 March 1946 a preliminary agreement with France was signed; it was never ratified by the French Government.

[3] Ibid. Arts. 23 and 49 indicate that the Republic was to exercise complete independence in foreign relations and have direct diplomatic relations with foreign states.

[4] *New York Times*, 14 February 1947; *Le Monde*, 6 June 1948. See statement of representative of France at Economic and Social Council, 12 August 1948 (U.N. Doc. E/SR.196 at p. 7).

[5] Lauterpacht, *Recognition in International Law* (1947), pp. 41 ff.

[6] This view is expressed in the Resolutions of the Institute of International Law adopted at Brussels, 1936 (see *A.J.* Supplement, 30 (1936), p. 185), and in Art. 3 of the Convention on Rights and Duties of States, signed at Montevideo, 26 December 1933 (Hudson, *International Legislation*, vol. vi (1937), p. 622).

It also follows, in the circumstances, that its decision must have rested on the absence of recognition by any state—a situation which it may be presumed was readily ascertainable by the Secretariat. Thus it would appear that in the *Viet Nam* case the Secretariat acted in accordance with the 'constitutive' view of recognition; in effect, it considered recognition by other states as the decisive act which creates the legal rights associated with statehood.[1] In the absence of such recognition the community is not treated as a state regardless of whether the facts would have satisfied the criteria prescribed by international law. Now it may well be that this position is supported by the weight of the authority as manifested in state practice and judicial opinion;[2] but it cannot be denied that there are a large number of distinguished writers and a substantial body of judicial decisions in support of the declaratory view.[3] For the Secretariat to reject a widely accepted view is not usual unless it deems it has compelling reasons to do so; hence it may throw some light on the general issues involved to consider what grounds the Secretariat may have had, quite independently of the legal precedents, for not accepting the declaratory view in the *Viet Nam* case.

These reasons become apparent if we consider the difficulties which would result from attempting to apply the declaratory view to the problem facing the Secretariat in connexion with Viet Nam. The essence of the declaratory view, it has been pointed out, is its reliance on the 'obvious' fact of existence of a state;[4] but the *Viet Nam* case, like many others that might be cited, demonstrates that there is no simple factual test of existence in a controversial situation. Thus, the question of whether or not Viet Nam's proclaimed independence may be considered actual is a complex matter involving mixed questions of law and fact. Even if a seceding group has enjoyed success for a year or two the possibility of the mother country reasserting its dominion cannot be eliminated from consideration; its recognized status as the *de jure* sovereign remains a factor which cannot be disregarded.[5] The problem is particularly difficult where active hostilities exist as they did in Viet Nam.[6] Similarly, whether a community may be said to possess an effective and stable political organization is usually a complicated question, especially in a situation involving armed rebellion.[1] It is hardly necessary to elaborate this point in order to show that there were no simple tests which could be applied with certainty in as controversial a situation as Viet Nam. It is evident that a technical and administrative body such as the Secretariat operating under limited authority could not attempt to assess and determine the conflicting positions with respect to a matter so fraught with political significance; it could not substitute its own judgment on the excuse that it is merely ascertaining obvious facts. From the Secretariat standpoint, therefore, the essential defect of the declaratory view is that it does not provide for a definite and certain indication of 'statehood'.[2]

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[1] See Lauterpacht, *Recognition*, pp. 38 ff., for discussion of the constitutive view.

[2] This is Professor Lauterpacht's conclusion (ibid., at pp. 43 ff. and 61 ff.).

[3] See, for example, Brierly, *The Law of Nations* (3rd ed., 1942), p. 11; Fischer Williams in *Harvard Law Review*, 47 (1933), pp. 776 ff.; Hackworth, *Digest*, vol. i (1940), p. 161.

[4] See quotations in Lauterpacht, *Recognition*. pp. 41, 42.

[5] Ibid., p. 46. Cf. *Keith* v. *Clark* (1878), 97 U.S. 454 in which the United States Supreme Court held that the seceding states of the Confederacy had never been out of the Union.

[6] Whether the Republic of Viet Nam could be considered as enjoying autonomy was vigorously debated by the Economic and Social Council at its Seventh Session. See U.N. Doc. E/SR.196 (12 August 1948), pp. 4–27. For general comment, see Hyde, *International Law*, vol. i (2nd ed., 1945), p. 153: 'The according of recognition to a country still in the throes of warfare against the parent State . . . constitutes participation in the conflict.'

But the question may be raised as to whether this defect is remedied by accepting the constitutive position—that is by relying on the test of recognition by individual states. It is true that recognition, unlike 'existence', is a definite and verifiable fact; it also may be granted that where there is not a single instance of recognition (as in the case of Viet Nam) or where recognition is general and non-controversial, the constitutive view is an adequate basis for Secretariat administrative action. It is, however, evident that in the important class of cases in which the Member states themselves are divided with respect to the status of a community the Secretariat cannot decide by adding 'recognitions' and subtracting 'non-recognitions'; what is required is an authoritative decision, not an arithmetical computation. That the difficulty is a real one is apparent when one recalls the sharp cleavages which have existed in the cases of Indonesia, Israel, and other communities; and when one considers that the Secretariat is faced with this problem not only in its administrative functions but as a depository of treaties to which only states may be parties.[3]

In view of these difficulties, which exist whether we accept the declaratory or constitutive view, could not the Secretariat obtain the requisite certainty by referring these questions to the International Court of Justice or to the General Assembly? This possibility raises questions which are outside the scope of this paper but a few remarks may be useful with particular reference to the position of the Secretariat. With respect to the proposal that the Court should render an opinion on this question, it might be noted that while the Secretariat may as a principal organ be authorized by the General Assembly to request advisory opinions, it has not as yet received such authorization; until it does so, the Secretariat would have to proceed through the General Assembly or other organ concerned. What is more important is whether this issue may be considered a 'legal question' as required by Article 96 of the Charter and Article 65 of the Statute of the Court. It should be noted that, in the present context, this is not the same as the question of whether recognition is 'legal' or 'political'. For even those who accept the view that recognition by individual states is an act of policy unrestricted by any requirements will generally agree that 'recognition' (or a determination of legal status) by a central authority will have to be based on general rules.[1] If so, it could reasonably be maintained that the application of such general criteria of statehood to a particular situation is typically and properly a judicial function.[2] There are, however, other considerations which may militate against the use of the Court for this purpose. Thus, if one considers the cases of Viet Nam, Indonesia, or Israel, it is evident that it would be difficult for a judicial body to make the determinations in a situation involving so many questions of political significance. It may be noted that even so staunch an advocate of the legal character of recognition (and, one may add, of judicial settlement) as Professor Lauterpacht concedes that 'there is substance in the view that it is undesirable to burden the Court with a task whose implications and potential consequences are of capital political significance'.[3]

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[1] See discussions in the Security Council relating to the authority of the Indonesian Republic and Israeli Governments, U.N. Doc. S/PV/171 (31 July 1947); S/PV/294 (18 May 1948); S/PV/330 (7 July 1948).

[2] But it should be noted that the declaratory view with respect to Viet Nam was maintained by the representative of U.S.S.R. at the Seventh Session of the Economic and Social Council. The question under discussion was whether the Republic should be invited to participate in the Economic Commission for Asia and the Far East (U.N. Doc. E/SR.196 (12 August 1948), p. 11).

The representative of the United States in reply stated that 'extraordinary complications in international affairs' would result if the United Nations entertained requests from entities which enjoyed neither *de jure* nor *de facto* recognition: ibid. at p. 16. See also statements of representative of France, denying the 'existence' of Viet Nam (ibid. at pp. 5 and 18).

[3] This question would be presented when a community whose status is doubtful seeks to deposit an instrument of accession to a treaty open only to states. It is not raised where the treaty is open to authorities which are not states; thus, the Indonesian Republic signed the Havana Trade Charter without apparently raising this question since the Charter expressly provides that it is open for signature and acceptance by 'separate customs territories' as well as by states. See Art. 71 of Havana Charter signed 24 March 1948 (U.N. Doc. E/Conf. 2/78).

As for determinations by the political organs of the United Nations, it would be difficult in principle to find objections to their determining questions of statehood. There is general agreement that the decisions of the Security Council and the General Assembly in connexion with the admission of an applicant to membership in the United Nations constitute a definitive determination for the purposes of Article 4 of the Charter that the applicant meets the requirements of statehood.[4] Similarly, determinations as to the legal status of a community may properly be made by an organ in other cases in which a decision of this character appears necessary or desirable for the solution of the problem before that organ.[1] But, while the authority of an organ to make such decisions in the course of its functions is generally accepted,[2] there has been considerable reluctance on the part of representatives of Members to exercise this authority even when it appeared necessary.[3] There have, of course, been varying motives for such reluctance, but it seems clear that a substantial factor has been the concern of the delegates lest the decision of the organ be considered as 'implied recognition' on the part of the individual states.[4] In view of the support given to the doctrine of implied recognition by writers, this concern is understandable. It is not surprising that representatives of states should be wary of taking action which might be construed as tantamount to recognition, irrespective of the intentions of the states concerned. But the unfortunate consequence is that the failure of the organ of the United Nations to make a decision as to legal status may substantially hinder that organ in discharging its functions.

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[1] See, for example, Fischer Williams, op. cit., at p. 780.

[2] In this respect, it does not seem essential whether the rules in question are the conditions of statehood laid down by general international law or whether they are expressly adopted by a resolution of a United Nations body as proposed by Professor Jessup in *A Modern Law of Nations* (1948), at p. 47.

[3] Lauterpacht, *Recognition*, at p. 69. See also discussion in Security Council of Syrian proposal that the Palestine question be referred to the International Court of Justice (U.N. Doc. S/894). *Security Council, Official Records*, Nos. 97 and 98 (July 1948).

[4] The Secretariat expressed an opinion to this effect in response to a question at a meeting of

The solution of this difficulty would seem to be a clear and express rejection of the doctrine of implied recognition as applied to the actions of the organs of the United Nations. It is true that distinguished authorities[5] have maintained that this doctrine is applicable to the conduct of members in international organizations, but actual state practice in both the League and the United Nations fails to substantiate this position. Even admission to membership has not been considered as equivalent to recognition on the part of the Member states which had not previously recognized the state admitted, or its Government.[6] But while there is no legal rule which requires that recognition be implied from the act of an organ admitting a state to membership or participation, it would nevertheless seem advantageous for the organs to deny any such implication by an express declaration in the

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the Security Council considering the application of Austria prior to the conclusion of a peace treaty (U.N. Doc. S/PV/186).

[1] For example, the General Assembly or the Security Council may have to determine whether a community which seeks to bring a dispute to the attention of one of these organs is a 'state' under Art. 35, para. 2.

[2] See report of Committee IV/2 at San Francisco in regard to the interpretation of the Charter (U.N.C.I.O. Doc. 933; also reproduced as U.N. Doc. A/474, 13 November 1947).

[3] See discussion at 171st Meeting of the Security Council as to whether the Indonesian Republic may be considered as a 'state' under Art. 32 (S/PV.171, 31 July 1947). See also U.N. Doc. E/606, 8 January 1948 (Report of E.C.A.F.E.); E/SR.196, 12 August 1947 (Econ. and Soc. Council Meeting).

[4] This concern was expressed at the 330th Meeting of the Security Council in regard to Israel (S/PV.330, 7 July 1948, pp. 6, 7–10, 16).

[5] Scelle, Anzilotti, Schücking and Wehberg, Verdross, Rougier, Fauchille, and others have taken this position. For citations see Graham, *The League of Nations and the Recognition of States* pp. 73, 74, n. 89.

[6] Lauterpacht, *Recognition*, pp. 401, 402. There are numerous cases in which Members of the United Nations do not maintain direct relations with other Members.

pertinent resolutions. This would have the effect of minimizing any evidential value (in support of recognition) which might otherwise be attached to the resolution and hence would undoubtedly remove a substantial impediment in the way of the organs making decisions as to status. Moreover, as a consequence of more frequent collective decisions as to legal personality (even though limited in effect), there would probably develop in time an increasing readiness on the part of the states to accept the fact that such decisions should be made by the organs of the international community. They would then be more likely to agree to collective recognition—that is, to a rule which would expressly provide that if the competent organ of the United Nations decides that a community has met the requirements of statehood, then that community shall be entitled to recognition by all of the Member states.[1]

It may be useful to summarize briefly the conclusions of this section. It has been indicated that neither the declaratory view of recognition (with its emphasis on the 'obvious' facts) nor the constitutive position (which relies on individual recognitions) furnishes a satisfactory basis for United Nations action. Consequently it has been submitted that questions as to legal status of a community should be referred to appropriate organs of the United Nations for their determination in accordance with law and principle. But it has also been suggested that such collective decisions should not by implication be considered as the equivalent of recognition or as requiring subsequent recognition. Finally, the hope has been expressed that, as the United Nations organs develop the practice of making collective decisions on questions of international personality, the Member states will be persuaded in time to accept the principle of collective recognition and accordingly to transfer the function of recognition to an international body, which in Professor Lauterpacht's phrase would not be 'impeded by a conflict between interest and duty'.[2]

VI. *The position of states which are not Members of the United Nations*

In rejecting the principle of automatic membership,[3] the framers of the Charter drew a clear line between the Member states and those states which are not Members. As a necessary consequence the non-Members were not made subject to the obligations of Members nor accorded their rights and privileges. At the same time it was realized that the non-

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[1] Jessup, op. cit., p. 47.

[2] Lauterpacht, *Recognition*, p. 67.

[3] At the San Francisco Conference, several delegations had favoured a proposal that all states be *ipso facto* Members of the Organization and that their participation be obligatory. Although this proposal was not accepted, it was generally agreed that 'universality in this sense was an ideal toward which it was proper to aim' (Report of the Rapporteur of Committee I/2 on Chapter III, U.N.C.I.O. Doc. 1178, 24 June 1945).

Members should not be left entirely outside of the orbit of the Charter. Peace and security, it was evident, are not divisible. These opposing considerations could not be reconciled by any single formula. Within the broad scope of the Charter the relations between the Organization and the non-Members would have to extend to a variety of situations. It was therefore to be expected that neither the Charter nor the practice of the organs would impose a uniform pattern in this connexion. As a result the position of a non-Member state can only be understood in the light of the specific provisions of the Charter and the practice of the principal and subsidiary organs.

A brief review of these provisions and of the practice of the organs was presented in a legal opinion given by the Secretariat at the request of the Committee of the Economic Commission for Asia and the Far East.[1] The precise question presented at that time was whether there would be any legal objection to the Economic and Social Council extending the membership of the Commission to states which are not Members of the United Nations.[2] The Assistant Secretary-General in Charge of Legal Affairs reached the following conclusions: (1) while there is no explicit provision in the Charter on the subject of participation of non-Members in the Commissions of the Economic and Social Council, 'the Charter in spirit and principle envisages a clear difference between Members and Non-Members'; (2) this difference rests 'upon the fundamental principle that rights of Membership should not be granted unless the obligations of Membership were also assumed'; and (3) nevertheless full membership in a commission may be granted in 'special and exceptional circumstances', to be determined as a matter of policy by the principal organ concerned.[3]

A basic premiss of this opinion, as stated, is that 'it is only by Membership that a State accepts the obligation of the Charter'.[3] There can be little doubt that this opinion is legally sound. It is well recognized that, as a rule, international agreements cannot impose legal obligations on states not parties to them.[4] But while this view is as valid for the Charter as for other agreements, in the case of the Charter another principle must be considered in this respect. This is the principle found in paragraph 6 of Article 2 which imposes upon the Organization the obligation 'to insure that States which are not Members of the United Nations act in accordance with these principles [of Article 2] so far as may be necessary for the maintenance of international peace and security'.[1] Professor Kelsen has gone so far as to suggest that this principle, taken together with the requirement that Members shall fulfil their obligations, implies that the obligations imposed upon Members for the purpose of maintaining peace and security are also imposed upon the states which are not Members.[2] He has moreover suggested that, since the obligations relating to peace and security are the truly essential obligations, it follows that the United Nations as a 'community of legal obligations' includes as Members all of the states of the world.[3] While it may be difficult to accept the view that states not parties can be legally bound by the Charter, Professor Kelsen's analysis brings out the extent to which the Charter imposes its rules of conduct on states which are not Members.[4] Since this principle qualifies, in effect, the general premiss that the non-Members are not subject to the authority of the Charter, it would seem to be relevant to a consideration of the role of non-member states in the activities of the Organization.

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[1] Statement by Dr. Ivan Kerno, Assistant Secretary-General for Legal Affairs, before the Committee of the Whole of the Economic Commission for Asia and the Far East on 14 July 1947 (U.N. Doc. E/CN.11/AC.1/9, 16 July 1947).

[2] Report of the Committee of the Whole of the Economic Commission for Asia and the Far East (U.N. Doc. E/491, 23 July 1947, pp. 5 and 6).

[3] Statement by Dr. Kerno, cited *supra*, n. 1.

[4] See Oppenheim, *International Law*, vol. i (7th ed., 1948), pp. 831, 832.

The Charter itself provides for the participation of non-Member states in several respects. In the first place, a non-Member state may, under Article 35, bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the Charter. Pursuant to this Article both the General Assembly and the Security Council have, in their rules of procedure, permitted non-Member states to place items on the provisional agenda.[5] Although Article 35 allows the non-Member states to refer disputes to both the Security Council and the General Assembly, it is only in the Security Council that the non-Members have been granted the right to participate in the discussions relating to the dispute.[6] The absence of a similar provision applicable to the General Assembly appears to be the result of an oversight. In any event, the General Assembly has, in practice, indicated a willingness to permit the non-Members which are parties to a dispute to present oral statements in the main Committees of the General Assembly.[1] Mention should also be made of the right granted to non-Member states (whether or not they are parties to disputes) by Article 50. The latter provides that any state whether a Member of the United Nations or not which finds itself confronted with special economic problems arising from the carrying out of preventive or enforcement measures against another state shall have the right to consult the Security Council with regard to a solution of those problems.

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[1] See Report of U.S. Delegation to the President on the San Francisco Conference (1945, U.S. Dept. of State Publication, No. 2349) which stated (p. 42) that 'unless the Organization undertook this responsibility with respect to States not Members of the Organization, the whole scheme of the Charter would be seriously jeopardized'.

[2] Kelsen, 'Membership in the United Nations', in *Columbia Law Review*, 46 (1946), pp. 391, 394.

[3] Ibid., at p. 411. See also Advisory Opinion of the International Court of Justice on *Reparation for Injuries suffered in the service of the United Nations* (*I.C.J. Reports*, 1949, pp. 174, 185), which holds that the United Nations has the capacity to bring international claims against states which are not Members.

[4] Mention should also be made of Art. 106 which authorizes the parties to the Moscow Declaration of 1943 and France (in effect, the permanent Members of the Security Council) to take such joint action on behalf of the Organization as may be necessary for the purpose of maintaining peace and security. Under this Article the authority of the Organization could be imposed on non-Member states.

[5] Rules of Procedure of the General Assembly, Rule 12 (*h*) (U.N. Doc. A/520, 12 December 1947); Provisional Rules of Procedure of the Security Council, Rules 6 and 7 (U.N. Doc. S/96/Rev.3, 27 January 1948).

[6] Charter, Art. 32.

These provisions, it will be noted, all relate to the participation of non-Member states in matters of peace and security. The only other explicit provisions in the Charter concerning the participation of states not Members of the United Nations relate to the International Court of Justice. Under Article 93 a state which is not a Member may become a party to the Statute of the Court 'on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council'.[2] In addition Article 35 of the Statute of the Court provides that the Court shall be open to other states, that is states not parties to the Statute, on conditions to be laid down by the Security Council, provided that in no case shall such conditions place the parties in a position of inequality before the Court. This Article has been implemented by a resolution of the Security Council which imposes the following condition, that such state shall have deposited a declaration by which it 'accepts the jurisdiction of the Court' and undertakes to comply in good faith with the decision of the Court and to accept all the obligations of a Member under Article 94 of the Charter.[3] Since under these provisions non-Member states may be parties in cases before the Court it follows that they may also have recourse to the Security Council under Article 94 of the Charter if the other party to a case fails to perform the obligations incumbent upon it under a judgment of the Court. Conversely, under the same provision, the non-Member state would also presumably be subject to the measures decided upon by the Security Council to give effect to the judgment.[4]

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[1] The First Committee decided to hear statements of representatives of Bulgaria and Albania on the Greek question, but full participation in the debate was not permitted (Doc. A/C.1/SR.62, pp. 6–10, 62nd Meeting of First Comm., 27 September 1947). At the Special Sessions on the Palestine question the First Committee granted hearings to representatives of the Jewish Agency and the Arab Higher Committee (U.N. Doc., A/C.1/151, 6 May 1947).

[2] Switzerland, which is not a Member of the United Nations, became a party to the Statute of the Court by its deposit on 28 July 1948 of an instrument which conformed to the conditions set by the General Assembly in its Resolution 91 (I) of 11 December 1946.

[3] Security Council Resolution of 15 October 1946. Professor Hudson has criticized this resolution on the ground that it has 'confused the problem of opening the Court to litigants, with the problem of jurisdiction over disputes. It should have provided for access without dealing with jurisdiction' ('The Twenty-Fifth Year of the World Court', in *A.J.* 41 (1947), at p. 8).

[4] In the report of the Committee of Experts of the Security Council concerning the conditions on which Switzerland may become a party to the Statute, it was stated that the non-Member states which become parties to the Statute (or which have access to the Court as non-parties)

The participation of non-Member states in economic and social matters does not appear to have been mentioned in the Charter. At first glance this seems surprising for it must have been understood that in 'solving international problems of an economic, social, cultural or humanitarian character' non-Member states could not be isolated.[1] But this omission may be explained by the fact that in virtually all of the provisions mentioned above the rights of the non-Member state relate to a situation in which it is or may be a party to a dispute. Since it was not contemplated that the Economic and Social Council would deal with disputes as such,[2] there appeared to be no reason to include similar provisions according rights to non-Member disputants in regard to matters before the Council. It does not follow, however, from the absence of provisions relating to non-Members that the Council is barred from providing for their participation where it considers such participation useful. Indeed, it is obvious that under contemporary conditions of economic interdependence it would be inimical to the objects of the Council to exclude from some of its technical discussions states which have not been admitted to the United Nations. This has been increasingly recognized in the practice of the Council, as it has progressed from its initial organizational tasks to the consideration of actual economic and social problems.

The first instance of participation by a non-Member state appears to have occurred in the case of the Executive Board of the International Children's Emergency Fund. In this case the resolution of the General Assembly establishing the Children's Fund provided that the Economic and Social Council on the recommendation of the Executive Board may designate 'other Governments' as members of the Board.[3] Under this provision Switzerland was elected as a member of the Executive Board of the Fund by the Economic and Social Council.[4]

In establishing its own Commissions the Council has followed a varied practice with respect to the non-Member states. During the first year of its existence, when it adopted the terms of reference for the functional Commissions, membership was limited to the Members of the United Nations

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become bound by the obligations under Arts. 25 and 103 of the Charter 'in relation to the provisions of Article 94 (but not otherwise)'. See Annex to U.N. Doc. A/239, 10 December 1946. It has been suggested that the Security Council has not been granted additional power by Art. 94 but is limited to its jurisdiction as defined in Chapters V, VI, and VII. This position was taken by Mr. Pasvolsky in the Hearings on the Charter before the U.S. Senate Committee on Foreign Relations. See *Hearings*, at p. 287.

[1] Charter, Art. 1, para. 3.

[2] This is not to say that the Council lacks jurisdiction to consider a dispute which is related to an international economic problem and is of such a nature as would primarily be the concern of the Council. See opinion of Dr. Kerno in regard to item relating to the withholding of Yugoslav Gold Reserves by the U.S. (U.N. Doc. E/AC.6/25, 1 March 1948). In declining to consider the Yugoslav Gold Dispute the Council stated it was not competent to take cognizance of the various aspects of the dispute because of the juridical issues involved: see Resolution No. 111 (VI), 9 March 1948.

[3] General Assembly Resolution 57 (I), 11 December 1946, para. 3 (*c*).

[4] Economic and Social Council Resolution No. 44 (IV), 29 March 1947.

without any provision for participation by non-Member states.[1] However, in the second year the Council, in establishing the regional Economic Commissions, took account of the economic relationships in those areas between the Members and the non-Member states. In the case of the Economic Commission for Europe, the Council provided that European nations which were not Members of the United Nations may be admitted in a consultative capacity on conditions to be determined by the Commission.[2] At its first session the Commission decided in general terms to invite the non-Member countries 'whose cooperation would be of value to the carrying out of the work of the Commission' and that this decision should be made on the basis of technical considerations.[3] The Secretariat was thereupon authorized to invite non-Member nations (with the exception of Franco Spain) in the light of these principles.[3] On this basis the Secretariat invited all European non-Member nations (except Spain) to participate in the discussions in the Commission and its technical committees. In effect the non-Member nations have become part of the European Economic Commission with full freedom to discuss all of the items on the agenda to the same extent as a Member state; the only restriction is that the non-Member state does not possess the right to vote. In the case of the technical committees of the Commission, through which the major part of the work is done, the non-Members participate fully in their activities.[4] While it is true that they do not possess the right to vote, that part has been of little consequence because as a matter of practice the technical committees have reached their decisions without resorting to voting procedure. We might safely conclude that so far as the actual work of the European Economic Commission is concerned there has been virtually no distinction between the Members and the non-Members.

In the case of the Economic Commission for Asia and the Far East the Council recognized the desirability of providing for participation of non-Members. However, it did not follow literally the arrangement contained in the terms of reference for the European Commission. The main reason for that difference was the fact that in Asia the non-Member communities were mainly territories which could not be considered as states in international law. Moreover, in several cases these territories were in the process of attaining a greater degree of self-government in matters of external relations.[1] In view of this the Council provided that certain named territories may be admitted by the Commission as 'associate Members'. It was further laid down that a 'territory' which has become responsible for its own international relations may be admitted on itself presenting its application, whereas other territories would require presentation of the applications by the Members responsible for the conduct of their international relations.[2] It will be noted that the use of the term 'territories' without at the same time also mentioning 'States' appears to be due only to the Council's preoccupation with the problem of the non-self-governing territories; it clearly was not intended to exclude from associate membership those of the named territories which had attained sufficient independence to have become recognized as states. Thus a dominion such as Ceylon (which has been recognized as a state for purposes of admission to international organizations) has been considered as a territory eligible for associate Membership in the Commission.[3] In short, the fact that a territory has become a state does not prejudice its right to become an associate Member; its greater independence merely has the effect of permitting it to present its own application. As far as participation in the Commission is concerned the position of the associate Member in the E.C.A.F.E. appears to be the same as that of the non-Member nation which has consultative capacity in the European Economic Commission; it participates fully but does not possess the right to vote.[3] The Economic Commission for Latin America has the same provision for associate membership of territories as the Economic Commission for Asia and the Far East.[4]

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[1] For terms of reference of functional commissions see Resolutions adopted at the Second Session of the Council (*Journal of the Council*, No. 29, 13 July 1946, pp. 512–26; also *Yearbook of the United Nations*, 1946–7, at pp. 470 ff.).

[2] See para. 8 of terms of reference contained in Resolution 36 (IV) of the Economic and Social Council. See also Report of the Economic and Social Council, cited *supra*, n. 21 at p. 24.

[3] U.N. Doc. E/451 (Report of the First and Second Sessions of the Economic Commission for Europe), at p. 6.

[4] See the following reports of the Economic Commission for Europe to the Economic and Social Council; U.N. Docs. E/451, 18 July 1947; E/603, 13 January 1948; E/791, 18 May 1948.

Finally it may be noted that the Economic and Social Council has uniformly followed the practice of inviting non-Member states to international conferences convened by it on matters within its competence. In three international conferences, namely, the International Health Conference,[5] the Conference on Trade and Employment[6] and the Conference on Freedom of Information,[7] the Council provided that the non-Member states which were invited would not be granted voting rights.[8] However, the Council changed its position in 1948 in connexion with the United

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[1] See *Report of the Committee of the Whole of the Economic Commission for Asia and the Far East* (U.N. Doc. E/491, 23 July 1947, pp. 5–7).

[2] Economic and Social Council Resolution No. 69 (V), 5 August 1947.

[3] See *Report of First and Second Sessions of the E.C.A.F.E.* (U.N. Doc. E/606, 8 January 1948, at p. 7).

[4] Economic and Social Council Resolution No. 106 (VI), 25 February 1948.

[5] Held in New York from 19 June to 22 July 1946.

[6] Held in Havana from 21 November 1947 to 24 March 1948.

[7] Held in Geneva from 23 March to 21 April 1948. The Council Resolution calling the conference was passed 15 August 1947 at the Fifth Session (Res. No. 74 (V)).

[8] See Economic and Social Council Resolutions No. 2, 11 June 1946 (Health), No. 62 (V), 28 July 1947 (Trade and Employment), and No. 74 (V), 15 August 1947 (Freedom of Information).

Nations Maritime Conference and decided that all of the invited states, whether or not Members of the United Nations, shall be entitled to vote at the conference.[1] While in one sense this decision merely reverts to the traditional practice under which all states participated in international conferences on the basis of equality, it may also be considered as further confirmation of the fact that, at least in economic and social matters, the United Nations is moving closer to the ideal of universality originally envisaged by the framers of the Charter.[2]

VII. *Reservations to multipartite treaties*

One of the more difficult questions faced by the Secretary-General in his capacity as a depository of multipartite agreements is presented when a state desires to make a reservation to the agreement at the time of its signature, or at the time of deposit of an instrument of ratification or accession. The general principle of international law governing this situation is quite clear: 'A State which wishes to make a reservation to a treaty may do so only if all other States which are parties to the treaty or which as signatories are likely to become parties consent to its so doing.'[3] A corollary of this principle is that the depository would not be justified in allowing a signature or a definitive deposit of an instrument which is subject to reservation without obtaining the consent of all the states which have become parties and possibly the consent of the signatory states which have not yet become parties.[4] On their face these rules appear to be sufficiently clear and simple of application. In practice, however, they may present serious difficulties for the depository; for it is evident that a requirement of unanimous consent may, in certain circumstances, prove to be a substantial obstacle. That the Secretary-General has been faced with these difficulties is apparent from the record; it may be instructive to consider two actual cases and the methods used to solve the problem.

The first case concerns the instrument of acceptance, on the part of the United States, of the Constitution of the World Health Organization.[5]

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[1] Economic and Social Council Resolution No. 113 (VI), 3 February 1948. For discussion of the voting issue, see records of the 124th Plenary Meeting of the Council. The Maritime Conference was held in Geneva from 19 February to 6 March 1948.

[2] The Council also indicated that it had no objection to the admission of Austria, Hungary, Italy, and Switzerland to the U.N.E.S.C.O.: Res. No. 59 (IV), 24 March 1947, and Res. No. 94 (V), 21 July 1947. See also Res. 67 (V), 24 July 1947, inviting non-Member governments to co-operate in supplying information on fiscal matters; and Res. No. 49 (IV), 28 March 1947, inviting non-Member states (except Franco Spain) to become parties to the protocol transferring the functions of the League of Nations under the international agreements relating to narcotic drugs.

[3] *Harvard Research, Draft Convention on Law of Treaties*, General Comment on Arts. 14, 15, and 16: *A.J.* Supplement, 29 (1935), p. 870. See also Malkin in this *Year Book*, 7 (1920), pp. 141 ff.

[4] Hudson, *International Legislation*, vol. i (1931), p. l.

[5] The Constitution of the World Health Organization was drawn up and signed at the International Health Conference which met in New York from 19 June to 22 July 1946, in accordance

This instrument, signed by the President, stated that it was subject to the provisions of the Joint Resolution of Congress authorizing the President to accept membership for the United States in the World Health Organization.[1] Section 4 of this Resolution contained the following provision:

> 'In adopting this Joint Resolution the Congress does so with the understanding that, in the absence of any provision in the World Health Organization Constitution for withdrawal from the Organization, the United States reserves its right to withdraw from the Organization on a one-year notice: provided, however, that the financial obligations of the United States to the Organization shall be met in full for the Organization's current fiscal year.'[2]

The first question for the Secretary-General to decide was whether this provision regarding withdrawal should be considered as a reservation. It was clear that it would have to be regarded as a 'formal declaration' since the Joint Resolution was incorporated by reference in the instrument of acceptance.[3] The main question, therefore, was whether the clause relating to withdrawal constituted an exception to the obligations imposed by the Constitution—in other words, would it have the effect of giving the United States a freedom of action which it would not otherwise enjoy under the Constitution?[4] On the face of it the answer appeared to be clearly in the affirmative. In the first place it is an accepted rule of international law that unilateral withdrawal is not permissible in the absence of a provision allowing—either expressly or by implication—for such withdrawal.[5] The only exception (which is by no means universally accepted) would be the application of the principle of *rebus sic stantibus*—though even if the application of that doctrine is accepted it would not have the effect of conferring upon the parties the unqualified right to withdraw regardless of a material change in the facts.[6] Moreover, the Constitution of the World Health Organization itself offers no basis for an inference that unilateral withdrawal would be permitted; it is obvious that an agreement which creates a permanent international organization is intended to continue in effect indefinitely. The omission of the usual clause permitting denunciation or withdrawal was evidently due, not to an oversight, but to a general

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with a resolution of the Economic and Social Council. The Final Act of the Conference, including the Constitution, has been issued as U.N. Doc. E/155. The Constitution entered into effect on 7 April 1948.

[1] *U.S. Dept. of State Bulletin*, vol. xix, No. 472 (18 July 1948), p. 80; U.N. Press Release 236 (21 June 1948).

[2] U.S. Pub. Law 643, 80th Congress, section 4. See Conference Report, House Rept. No. 2197, 80th Congress, 2nd Session (4 June 1948).

[3] Acceptance on the part of the United States of America, signed by the President, 14 June 1948.

[4] *Harvard Research*, *Draft Convention on Law of Treaties*, comment on Art. 13, op. cit., *supra*, at pp. 857 ff.; Hudson, op. cit., vol. i, pp. l, li.

[5] Oppenheim, *International Law*, vol. i (7th ed., 1948), p. 843; *Harvard Research*, op. cit., at pp. 1173–5 (comment to Art. 34 of Draft Convention).

[6] See McNair, *The Law of Treaties* (1938), pp. 376–449; *Harvard Research*, op. cit., at p. 1174; Jessup, *A Modern Law of Nations* (1948), pp. 150 ff.

policy which favoured universality and deprecated unilateral action.[1] This is confirmed by the opinion current in Congress that a reservation would be necessary in order to safeguard the right to withdraw at will.[2]

In view of this there would seem to be little doubt that the United States condition as to withdrawal should be considered as a true reservation providing for an exception to the obligations imposed by the agreement. Under the normal procedure the depository would be expected to communicate the reservation to all of the parties and to inquire whether they object to it;[3] in the absence of unanimous consent there would be no definitive deposit. However, in this particular case the circumstances reveal that the normal procedure might not have been entirely satisfactory. The fact was that the United States instrument of acceptance had been submitted only a few days before the opening of the first meeting of the World Health Assembly, the governing body of the Health Organization.[4] Because of the pre-eminent position of the United States in the technical field and the leading role which it was expected to play in the World Health Organization its absence from the first constitutive meeting of the Assembly might have important disadvantages.[5] It was, moreover, evident that the consent of all the Members could not be obtained within the short time available and that the requirement of unanimity might result in the rejection of the acceptance if the states were to act separately without opportunity for consultation.[6] Thus by following the customary procedure, sanctioned by international law, the Secretary-General would be taking a step which would have serious practical implications for the World Health Organization. Moreover, the effect would be that a decision of great importance to an established international organization would be made not through the competent organs but by the states acting individually and separately, with each entitled to veto the ratification.

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[1] For discussion of the views expressed at the World Health Conference, see Sharp, 'The New World Health Constitution', in *A.J.* 41 (1947), pp. 509 ff.

[2] U.S. Congressional Record, 3 July 1947, p. 8447. U.S. Senate Report 421, 80th Congress, 1st Sess., p. 7. For history of W.H.O. legislation in the Congress, see Kaplan, '80th Congress and the United Nations', *Dept. of State Bulletin*, 12 September 1948.

[3] See Hudson's discussion of the procedure of the League of Nations in *A.J.* 32 (1938), pp. 330–5. See also Report of Committee of Experts for Progressive Codification of International Law (League of Nations, *Official Journal*, 8th Year, 1927 (Annex 967), p. 880).

[4] The U.S. instrument was deposited with the Secretariat on 21 June 1948, three days before the opening of the First World Health Assembly in Geneva.

[5] The Health Assembly was to elect the Executive Board and a Director-General and to establish basic policies and programmes. See Art. 18 of Constitution. It may also be relevant in this connexion to note that there had been prolonged consideration by the U.S. Congress of the measure providing for U.S. participation and that several reservations which had been approved by the House of Representatives were, in the end, eliminated. Under the circumstances, rejection of the ratification may have had adverse repercussions in the Congress. See *The New York Times*, editorials of 30 May and 27 June 1948.

[6] *The New York Times*, 23 June 1948, under heading 'U.N. Agencies Fight Curbs by Congress'.

The Secretary-General's method of dealing with the problem succeeded in avoiding this result. Upon receiving the instrument of the United States the Secretary-General informed the states parties to the Constitution that 'he is not in a position to determine whether the United States has become a party to this Constitution'.[1] But he went on to state that 'he is prepared to be guided by the action of the Health Assembly in regard to this matter since under Article 75 of the Constitution it is a competent body to settle any question concerning the interpretation or application of the Constitution'.[2] It is clear from this communication that the Secretariat assumed that the World Health Assembly was competent to decide, by interpretation of the Constitution, that the apparent reservation of the United States need not be considered inconsistent with the provisions of the Constitution.

In accordance with the communication of the Secretary-General the World Health Assembly gave consideration to the instrument of acceptance submitted by the United States and to the question of whether the condition regarding withdrawal may be considered as consistent with the obligation of Members under the Constitution. While certain delegates maintained that reservations were not permitted under the Constitution, it was agreed that the condition attached by the United States should not have the effect of excluding the United States from membership.[3] At the same time it was noted that the United States should not be in a more favoured position than the other Members and it was therefore suggested that the Assembly should lay down as 'a proposition of general application' that any Member state may terminate its membership on a year's notice.[4] At the conclusion of the discussion, it was announced by the President that, since there were no objections, 'the United States ratification of the Constitution is unanimously accepted by this Assembly'.[5] On the basis of this decision, the Secretary-General advised all of the states parties to the Constitution that the United States became a party as from the date of deposit with the Secretary-General of its instrument of acceptance of that Constitution.[6] The notification that the instrument was effective on the date of deposit provides further confirmation of the view of the Secretary-General that the Resolution of the World Health Assembly was to be considered not as signifying 'consent' by the parties but rather as an interpretation by the competent organ that the ratification was not inconsistent with the terms of the Constitution. Thus in effect the decision on the question of the reservation had been transferred to the Organization; and although the decision was in fact unanimous, this was not legally necessary since the Health Assembly could settle important questions of interpretation by a two-thirds majority vote.[1]

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[1] See U.N. Press Release H/236, 21 June 1948.

[2] W.H.O. Doc. A/VR/10, containing verbatim record of tenth plenary meeting of First World Health Assembly on 2 July 1948.

[3] Ibid.

[4] Ibid., at p. 11 (statement of delegate of India).

[5] Ibid., at p. 16.

[6] See Monthly Statement on Registration of Treaties by U.N. Secretariat for the month of June 1948 (Statement No. 16, Annex A, No. 221, p. 26).

While the method of 'interpretation' utilized in the case of the United States ratification to the W.H.O. Constitution appeared to be satisfactory in that situation, another and somewhat different procedure was followed by the Secretary-General in regard to reservations made to the Constitution of the International Refugee Organization. In that case three States—United States,[2] France,[3] and Guatemala[4]—had inserted into their instruments of acceptance conditions which related to their obligations under the Constitution. Whether these conditions constituted 'exceptions' to the obligations of the Constitution was not clear; indeed they raised difficult questions of interpretation under the complicated and somewhat vaguely drawn provisions of the I.R.O. Constitution.[5] In the circumstances it would have seemed to be appropriate for the Secretary-General to deal with the matter as he did in the case of the World Health Organization, that is to say, by referring the question of interpretation to a competent body. There was, however, one obstacle to this procedure: the instruments had been submitted prior to the entry into force of the Constitution, so that strictly speaking there was no competent organ of the specialized agency—which had not yet come into existence—to determine these questions. Needless to say, the Secretary-General as a depository hesitated to assume the responsibility for interpreting the Constitution in circumstances where there seemed to be considerable doubt regarding the effect of the conditions. It was therefore necessary for the Secretary-General to act in accordance with the normal procedure, namely, to communicate the instruments to the other states which had accepted the Constitution in order to ascertain whether they had any objection to the reservations. But, in following this procedure, the exigencies of the situation appeared to require some variation from the usual pattern. The main reason for this was that the I.R.O. had been designed to meet an emergency situation; it was evident that a prolonged delay in establishing the agency would defeat its essential purpose.[6] Under these circumstances, for the Secretary-General to have required affirmative consent from each of the states involved would have meant to incur a substantial risk; for, considering the complicated character of the reservations, it was not practicable to expect affirmative replies within a short period. We may assume therefore that it was in recognition of these facts that the Secretary-General did not request express consent when he communicated the reservations to the states.[1] However, before announcing the entry into force of the Constitution the Secretary-General again communicated with the states referring to his previous communication, stating that he intended to inform the parties of the entry into force of the Constitution on a given date, and requesting the transmittal of such observations as the Governments desired to make. No adverse replies were received and the Secretary-General thereupon informed the parties that the Constitution had come into force.[2]

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[1] See Art. 60, Constitution of the World Health Organization.

[2] Public Law 146, 80th Congress, approved 1 July 1947.

[3] *Journal Officiel de la République Française*, 24 December 1947.

[4] Decree No. 402 of 30 May 1947 enacted by the National Congress of Guatemala.

[5] The U.S. resolution stated in part that the Constitution shall not have the effect of abrogating or modifying any of the immigration laws or any other laws of the United States. The French acceptance included a condition limiting payment of contributions to payment in francs. The Guatemalan ratification stipulated that 'in conformity with Article 10, par. 2 of the Constitution' Guatemala would pay its due contribution in kind according to the needs and ability of the country.

[6] See Resolution 62 (I) of the General Assembly and the Preamble of the Constitution (U.N. Doc. A/64/Add.1 at pp. 98 and 99).

There ought to be no doubt that this procedure, while somewhat summary, was entirely proper. For, though it is agreed that express consent is desirable, it is also generally accepted that consent given by implication is sufficient. It is moreover recognized that the implication of consent may be drawn from the absence of an objection, provided that there has been communication of the proposed reservations.[3] We may conclude therefore that by adopting what may be referred to as the procedure of 'tacit consent' in the I.R.O. case, the Secretary-General was able to meet the necessities of the situation without any derogation from the established legal rule on the matter.

VIII. *The scope of the obligation to register treaties*

On the face of it there would appear to be no exception to the requirement of Article 102 that 'every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force' shall be registered with the Secretariat. Practice does not necessarily substantiate that conclusion. For many states have assumed that certain classes of international agreements were not within the scope of this obligation. The problem, it will be recalled, had been considered in the League during 1920–1, particularly after the terms of the military agreement between France and Belgium were not presented for registration.[4] After prolonged discussion, the Third Assembly of the League concluded that 'time and experience alone' will supply the material for giving a precise interpretation of the Covenant provision.[1]

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[1] Communication by Secretary-General dated 20 April 1948, which was sent to all signatory states, including those which had signed *ad referendum* but had not yet deposited their ratifications.

[2] U.N. Press Release IRO/85 dated 30 August 1948.

[3] *Harvard Research, Draft Convention Law of Treaties*, comment on Art. 14; *A.J.*, Supplement, 29 (1935), at p. 873. See also Owen, 'Reservations to Multilateral Treaties', in *Yale Law Journal*, 38 (1928), p. 1113. For a discussion of treaty provisions which give effect to 'tacit consent' see Hudson, 'Reservations to Multipartite International Instruments', in *A.J.* 32 (1938), pp. 330–5.

[4] See Hudson, 'The Registration and Publication of Treaties', in *A.J.* 19 (1925), p. 280.

At San Francisco, after more than twenty years of such time and experience, no more precise interpretation seemed possible or desirable.[2] There were suggestions that agreements need not be registered if they are of 'minor importance' or of 'temporary effect' and it was thought that the detailed regulations to be worked out by the General Assembly might clarify the question of scope.[3] However, when the regulations were drawn and adopted at the General Assembly, the Report of the Legal Committee stated there was agreement as to 'the undesirability of attempting at this time to define in detail the kinds of treaty or agreement requiring registration under the Charter, it being recognized that experience and practice will in themselves aid in giving definition to the terms of the Charter'.[4] Whether 'experience and practice' have in themselves aided in giving more precise meaning to the scope of the obligation is still far from evident at this time; a mere cursory examination of the Treaty Series and the statements on registration indicates that there has been little uniformity or consistency in the practice of states.

On the other hand, because of the provision for *ex officio* registration by the United Nations in certain cases, the Secretariat itself has been required to interpret the terms 'every treaty or every international agreement'. As a result it has felt obliged to report to the General Assembly regarding its own practice in those cases where there appeared to be questions of interpretation.

Thus, in its Report for 1947,[5] the Secretariat noted that it had taken steps for the *ex officio* registration of 'instruments of accession' by the new Members of the United Nations in pursuance of Rule 116 of the Provisional Rules of Procedure of the General Assembly. In considering that these instruments constituted international agreements, the Secretariat stated that it had relied upon a report of the committee concerned with this problem at San Francisco indicating that the terms 'treaties and international agreements' should be extended to include 'unilateral engagements of an international character which have been accepted'.[6] There would seem to be little question that under this liberal interpretation the instruments submitted by new Members, although unilateral in form, should be regarded as having been accepted by the other Members and, accordingly, as constituting binding agreements. It may be noted in this connexion that the Charter contains no provision for subsequent signatures or accessions. In consequence it was considered necessary in the Rules of Procedure to provide for the submission of a formal instrument by a new Member accepting the obligations contained in the Charter.[1]

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[1] Hudson, loc. cit., p. 285. Art. 18 of the Covenant referred to 'every treaty or international engagement'.

[2] See Report of Commission IV/2 at San Francisco, U.N.C.I.O. Doc. 933, p. 3. The Committee noted it proposed the term 'agreement' in preference to the term 'engagement' (which had been used in the Covenant) because the latter term 'may fall outside the strict meaning of the word "agreement" ' (ibid.).

[3] United Kingdom Commentary on the Charter, Misc. No. 9 (1945), Cmd. 6666, p. 14: Report of the United States Delegation to the President on the San Francisco Conference (*Hearings before the Committee on Foreign Relations, U.S. Senate, 79th Congress, 1st Session, on the Charter of the U.N.*, at pp. 131–3; also in Department of State Publication No. 2349 at pp. 153–5).

[4] U.N. Doc. A/266, 13 December 1946, p. 2.

[5] U.N. Doc. A/380, 4 September 1947, p. 2.

[6] Report of Commission IV/2 at San Francisco; op. cit., *supra*, at p. 4.

On the basis of the same general theory,[2] the Secretariat has also proceeded to register *ex officio* the declarations made by the states parties to the Statute of the International Court of Justice accepting the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute. Although such declarations were described by the Permanent Court as unilateral acts,[3] they had been registered by the League and could no doubt be considered as constituting obligations with respect to all other states which have made similar declarations. It may be noted that this interpretation was implicitly adopted by the United States which followed the treaty procedure with respect to obtaining the advice and consent of the Senate to the filing of the declaration by the President.[4]

Another instance of *ex officio* registration reported[5] by the Secretariat concerned the Trusteeship agreements which had been approved by the General Assembly, or, in the case of strategic areas, by the Security Council.[6] The legal basis for this action was not given in the report and does not appear clearly from the circumstances of this case. There are, under the regulations, only two possible grounds for *ex officio* registration: (*a*) where the United Nations is a party or (*b*) where it is authorized by the agreement.[7] In the case of the Trusteeship agreements, neither condition would appear to have been met; the agreements do not provide for *ex officio* registration and the United Nations is not a party. It might be suggested that since the approval of a United Nations organ is required for the coming into force of the agreements one could, by dint of a liberal construction, consider the United Nations itself as a party after it has given its approval. However, this would appear to be a questionable interpretation. For while approval by a United Nations organ is a condition of the agreement, there is no indication in the Charter or the agreement itself that the United Nations thereby becomes a party. Parties to the agreement, it has been generally assumed, are the 'states directly concerned',[1] since it is they who must 'agree upon' the terms of the Trusteeship under Article 79. The fact that the phrase 'the states directly concerned' has not been satisfactorily defined up to now is no sufficient reason for the conclusion that they are not the necessary parties.[2] To state that the United Nations may also be a party because its consent is required is not merely technically inaccurate. Any such statement tends to obliterate the distinction made by the Charter between the two stages in setting up a trusteeship, namely, the first stage of negotiation by the states concerned and a second stage in which the terms negotiated and agreed upon are approved by the General Assembly or the Security Council.[3] There may conceivably be other consequences resulting from an assumption that the United Nations is a party to the agreement. Thus there would seem to be little advantage in assuming that the United Nations is a party merely in order to justify the decision with respect to *ex officio* registration.

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[1] Under the amended Rules of Procedure of the General Assembly adopted on 17 November 1947, a state which submits an application for membership is required to include with it 'a declaration, made in a formal instrument, that it accepts the obligations contained in the Charter': Rule 123 (Doc. A/520, 12 December 1947).

[2] U.N. Doc. A/380, 4 September 1947.

[3] *Phosphates* case, Series A/B, No. 74, at p. 23.

[4] See Wilcox, 'The United States accepts Compulsory Jurisdiction', in *A.J.* 40 (1946), pp. 705–7.

[5] U.N. Doc. A/613, 17 August 1948.

[6] The document references to the trusteeship agreements approved by the General Assembly are given in Res. 63 (I) adopted 13 December 1946 and Res. 140 (II) adopted 1 November 1947. The text of the agreement approved by the Security Council in regard to the former Japanese mandated islands is contained in U.N. Doc. S/318, 2 April 1947.

[7] Art. 4 (1) of the Regulations to give effect to Art. 102 of the Charter (Res. No. 97 (I) of the General Assembly, 14 December 1946).

But while there may be some question as to the precise basis of the automatic registration of Trusteeship agreements, such action would appear to be warranted in the light of the policy and intent of the regulations adopted by the General Assembly. For the underlying purpose of providing for *ex officio* registration was to relieve the states of the burden of registration in those cases where the United Nations could authoritatively state that the agreement and the related information were accurate and authentic.[4] This condition is met in the case of the Trusteeship agreements by virtue of the requirement that they be approved by one of the competent organs of the United Nations. Hence, if it is considered necessary to rely on one of the provisions of the regulations it would seem preferable to base *ex officio* registration on an implied authorization in the Trusteeship agreements (perhaps derived from the requirement of approval by a United Nations organ) rather than on the dubious position that the United Nations has become a party.

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[1] U.N. Doc. A/87, 25 September 1947 ('Some points of procedure with regard to consideration of Trusteeship Agreements by the General Assembly'). See Sayre, 'Legal Problems Arising from U.N. Trusteeship System', in *A.J.* 42 (1948), pp. 283 ff.

[2] For an analysis of the problem see Wolfe, 'The States Directly Concerned', in *A.J.* 42 (1948), pp. 368 ff.

[3] That Art. 79 envisages these two steps in establishing a trusteeship appears to be generally agreed. See Sayre, op. cit., at p. 283; Wolfe, op. cit.

[4] This point is not mentioned in the regulations themselves nor in the reports relating to them, but it is a fair inference from the provisions and was evidently the rationale of the Secretariat's original proposal for *ex officio* registration. See also the memorandum submitted by the Secretariat summarizing the discussions in the sub-committee which drafted the regulations (U.N. Doc. A/C.6/124, 7 December 1946, at pp. 3 and 4).

Whatever the technical considerations, it is evident that the Secretariat has followed the general policy of giving full effect to the broad scope of the provisions of the Charter on registration and has therefore resolved cases of doubt in favour of registration. This is shown not only by the instances discussed above, but by the, negative, fact that the Secretariat has apparently refrained from excluding any international agreements which had been submitted for registration or for filing and recording.[1] Thus it has included numerous agreements of a financial and commercial character,[2] even though the practice of the League had suggested that certain types of such agreements were not considered by some states as coming within the scope of registration.[3] It has, moreover, included agreements of 'temporary effect' or which have been executed, although suggestions to the contrary have been made.[4] It has also, we may add, applied the provisions to agreements to which the United Nations itself or a specialized agency is a party. While that practice is clearly sanctioned by the regulations, there are some who maintain that such instruments are not to be considered international agreements.[5]

In all these cases it is evident that the Secretariat has acted upon the principle that the broad language of Article 102 does not admit of exceptions and qualifications. It has assumed that the basic purpose of the article is publicity and that that policy is equally applicable to all international contractual undertakings regardless of technical distinctions or traditional classifications. It is to be hoped that that view, which has been approved in principle by the General Assembly,[1] will be followed in practice by the Members. 'Open covenants' are, as has been pointed out,[2] an essential basis for public control of international relations and hence a significant 'source of moral strength' in international administration.

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[1] Under the regulations, 'treaties and international agreements' which are not subject to the registration requirement of the Charter are filed and recorded if they fall into one of the categories described in Art. 10. They are published in Part II of each volume of the Treaty Series.

[2] See, for instance, the following treaties in Part I of vol. iii: Nos. 21, 22, 23, 24, 25, 27, 28, 32, 34, 36, 37, 38; all of which are concerned with financial, commercial, or transport matters. Only five agreements in this part deal with other subjects.

[3] In 1921 the British Government expressed its opinion that certain financial arrangements between states were not 'treaties' and hence need not be registered. See *Official Journal of the League of Nations*, 1921, p. 224. However, in 1947, the representative of the United Kingdom (Mr. Beckett) at the Legal Committee of the General Assembly stated that the Charter provision applied to agreements of a financial, commercial, or technical character (U.N. Doc. A/C.6/SR.54, at p. 4, 29 October 1947).

[4] The U.S. Delegation at San Francisco apparently assumed that agreements of 'minor importance' or of 'temporary effect' should be excluded. See report to the President, loc. cit., *supra*. The Norwegian representative at the General Assembly Legal Committee (Mr. Seyerstad) expressed the view that agreements for the unfreezing of assets need not be registered since their practical importance disappeared after their execution (loc. cit., *supra*). In regard to the same point, Mr. Beckett suggested that a financial agreement under which there was no longer an outstanding obligation need not be registered (ibid., at p. 9). On the other hand, several delegates stated that there might be public interest in an executed or temporary agreement—and possibly a difference as to interpretation—and they noted that no exceptions of this character appeared in the Charter provision. The volumes of the Treaty Series do in fact contain a number of agreements with respect to which there is no longer an 'outstanding obligation'; see, for example, vol. i, Part II, No. 1; vol. iii, Part I, No. 23; vol. iv, Part I, Nos. 59 and 60.

[5] Mr. Beckett stated at the Legal Committee of the Second Session of the General Assembly that 'he deliberately excluded from the category of international agreements, those agreements to which the United Nations or a specialized agency was a party' (U.N. Doc. A/C.6/SR.54, at p. 5, 29 October 1947). Yet both Art. 4 and Art. 10 expressly provide that 'international agreements' as used in the regulations may include agreements to which the United Nations or a specialized agency is a party. These regulations were unanimously adopted by the General Assembly in December 1946 (Res. 97 (I)).

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[1] See discussion at 79th and 80th meetings of the Legal Committee at the Third Session of the General Assembly (Doc. A/C.6/SR.79 and 80, 20 and 21 October 1948). See also report of the Legal Committee at the Second Session, Doc. A/457, 10 November 1947.

[2] See Memorandum approved by the Council of the League of Nations, 19 May 1920 (*Official Journal, League of Nations*, 1920, p. 154). Also reproduced in U.N. Doc. A/C.6/51, 6 November 1946.

SOME OBSERVATIONS ON THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

By DR. EDVARD HAMBRO

1. THE jurisdiction of the International Court of Justice is laid down in Article 36 of its Statute. The first paragraph of that Article provides:

> '1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.'

The scope of this paragraph has been considerably enlarged through Article 37, which states:

> 'Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.'

A considerable number of such treaties were concluded both prior to 1939[1] and since the end of the Second World War.[2]

The first paragraph of Article 36 of the Statute might seem to be an important innovation compared with the Statute of the Permanent Court of International Justice. It contains an express reference to 'all matters specially provided for in the Charter of the United Nations'. This stipulation seems superfluous when coupled with the expression 'treaties and conventions in force'. The Charter of the United Nations is clearly a treaty. Furthermore, a closer examination of the Charter will, it is submitted, establish that it contains no 'matters specially provided for' in regard to the jurisdiction of the Court. The stipulation can only be understood if it is remembered that it was drafted by a Committee of Jurists in Washington in the spring of 1945, before the Charter was adopted in San Francisco that summer. It is stated in the Report of the Committee of Jurists that 'this text reproduces Article 36 of the Statute with an addition in case the United Nations Charter should make some provision for compulsory jurisdiction'.[3] Article 36 of the Statute of the Court should be compared with the third paragraph of Article 36 of the Charter, which provides:

> 'In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.'

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[1] See *Permanent Court of International Justice*, Series D, No. 6 (4th ed.).

[2] See *Year Books of the International Court of Justice*, chap. x, and *United Nations Treaty Series*.

[3] *United Nations Conference on International Organization* (hereinafter referred to as *U.N.C.I.O.*), vol. xiv, p. 668. See also Hudson in *A.J.* 40 (1946), p. 32.

In the proceedings concerning a preliminary exception in the *Corfu Channel* case before the International Court, Counsel for the United Kingdom argued that a case of compulsory jurisdiction had been established by this stipulation. The Court did not deem it necessary to deal with this claim, since it found that jurisdiction was based on a letter from the Albanian Agent which the Court was satisfied constituted a waiver of the right to raise a preliminary objection.[1] However, a substantial minority[2] of the Court presented a joint separate opinion in which they emphatically rejected the British submission.[3]

2. Paragraph 2 of Article 36 provides for the most typical cases of the compulsory jurisdiction of the Court:

> '2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> *a.* the interpretation of a treaty;
>
> *b.* any question of international law;
>
> *c.* the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> *d.* the nature or extent of the reparation to be made for the breach of an international obligation.'

It might be claimed in strict law and logic that this paragraph is not absolutely necessary. If the Court has jurisdiction in all cases which the parties refer to it and also in all matters provided for in treaties and conventions in force, it stands to reason that states may at any time confer jurisdiction upon the Court in this way. However, this paragraph has a great historic and ideological value, as will be pointed out presently. It creates the so-called 'Optional Clause'. Although this term has been given currency for many years and is still being used,[4] it is not proposed to use it in the present article.[5] The term, which historically[6] is quite understandable, has no particular meaning under the new Statute. The declaration whereby states accept the compulsory jurisdiction is not a 'clause',[7] but a special international instrument. Furthermore, it seems strange to refer to such acceptance as optional as if the optional character of undertaking this particular obligation were different from other instruments whereby states accept international obligations.

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[1] *Reports of the International Court of Justice* (hereinafter referred to as *I.C.J. Reports*), 1947–8, p. 26.

[2] Vice-President Basdevant and Judges Alvarez, De Visscher, Winiarski, Badawi Pasha, Zoričić, and Krylov.

[3] *I.C.J. Reports*, 1947–8, pp. 31–2.

[4] See, for example, Vulcan, 'La Clause facultative', in *Acta Scandinavica*, 18 (1947–8), pp. 30–55.

[5] It has not been used in the *Year Books of the International Court of Justice*, 1947–9.

[6] See Hudson, *The Permanent Court of International Justice, 1920–1942* (1943), p. 451.

[7] It is not intended to examine here whether the word 'clause' has any definite meaning in international law.

3. The second paragraph of Article 36 provides that the declaration can be filed only by parties to the Statute. The words used would seem to indicate that only the signatories, and no other state, can sign such declarations.[1] This rule aims at giving states making declarations under Article 36 a certain guarantee that they will not be bound in regard to states with which they do not wish to enter into this particular relationship. It does not necessarily preclude states not signatories of the Statute from accepting the compulsory jurisdiction of the Court.[2] There is no compelling reason to prevent other states from assuming the obligation to appear before the Court. Moreover, it is laid down in Article 35 of the Statute that the Court on certain conditions 'shall be open to other states'. On 15 October 1946 the Security Council adopted a resolution laying down these conditions.[3] It is stated in this resolution that the declarations made by 'other states' may be either particular or general. And, if the declaration is general, it is stipulated that:

> 'A State in making such a general declaration may, in accordance with Article 36, paragraph 2, of the Statute, recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Court, provided however, that such acceptance may not, without explicit agreement, be relied upon vis-à-vis States parties to the Statute, which have made the declaration in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice.'

Thus it would appear to be established that only states parties to the Statute can adhere to the compulsory jurisdiction of the Court and be parties to the network of declarations and mutual obligations created through the provisions of Article 36. This emerges from the article itself, as well as from the resolution of the Security Council. On the other hand, states which have deposited declarations accepting the compulsory jurisdiction in accordance with that resolution may be bound towards each other. There will, then, be two sets of reciprocal obligations: one between the states signatories of the Statute and one between the other states. Incidentally, it may be stated that the resolution of the Council of the League of Nations, which—in the words of Professor Hudson, a former Judge of the Permanent Court of International Justice[4]—was 'conceived in mystifying confusion', was not very happily drafted.[1] Only two states, Liechtenstein[2] and Monaco,[3] accepted the jurisdiction of the Permanent Court in this way. It is perhaps to be regretted that the Security Council copied the old resolution[4] and perpetuated the confusion between access to the Court and the jurisdiction of the Court.

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[1] See Hudson, op. cit., pp. 450 ff.

[2] See Vulcan, op. cit., p. 35.

[3] Security Council, *Official Records*, First Year, Second Series, p. 468; *I.C.J. Year Book*, 1946–7, p. 106; and *I.C.J.*, Series D, No. 1, 2nd ed., p. 98.

[4] In *A.J.* 41 (1947), p. 7.

4. The most difficult and important questions in regard to the declarations under Article 36 arise in connexion with the reservation as to 'reciprocity'. The second paragraph of Article 36 of the Statute lays down quite clearly that the compulsory jurisdiction may be accepted 'in relation to any other state accepting the same obligation'. It should, accordingly, be obvious that reciprocity is an absolute condition. Professor Hudson says on his subject:[5]

> 'Every declaration made under paragraph 2 of Article 36, whether it is made by signature of the optional clause or otherwise, has this characteristic impressed upon it. It is not a reservation made by the declarant; it is a limitation in the very nature of the declaration which operates under or is made "in conformity with" paragraph 2 of Article 36.
>
> . . . .
>
> 'In a few cases, however, the declaration is made without the use of any such formula, or expressly "without condition". From a legal point the formula seems to serve no purpose; all of the declarations contain the limitation *ipso facto*, and this is true even though they are said to be "without condition".'

This categorical opinion, coming as it does from a writer of high authority, cannot lightly be set aside. It may be agreed that a declaration under Article 36 and without any mention at all of reciprocity may still contain this reservation since it forms part of Article 36. As will be seen later, this is not quite certain. It is when the state makes it clear that the obligation is assumed 'without condition'[6] that the doubts become serious. If a state wishes to make its acceptance of the compulsory jurisdiction not subject to any condition, why should it not be able to do so? Is there any rule of international law preventing states from accepting far-reaching unilateral obligations? They may thereby put themselves in a position of inequality as regards other states. They may give up a fraction of their sovereignty. They may consider it laudable for states to give up some of their sovereignty in order to increase the scope of the compulsory jurisdiction of the International Court of Justice.

The possibility of making declarations which are not based on reciprocity seems, further, to be supported by paragraph 3 of Article 36, which states unequivocally that the declarations may be made 'unconditionally or on condition of reciprocity on the part of several or certain states'. It is, then, respectfully submitted that it is open to any state to make a declaration accepting the compulsory jurisdiction of the Court in regard to all other states whether or not they have accepted a similar obligation. In view of these considerations it seems safe to assume that it is possible for a state to accept the jurisdiction of the Court without reciprocity, but that such unconditional acceptance cannot be presumed.

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[1] See Hudson, op. cit., pp. 386–7.

[2] *P.C.I.J.*, Series E, No. 15, p. 49.

[3] Ibid., No. 13, p. 71.

[4] See *A.J.* 41 (1947), p. 8.

[5] Op. cit., pp. 451, 465.

[6] The only state which has used this formula is, it is believed, Nicaragua (see *I.C.J. Year Book*, 1946–7, p. 210). This declaration, however, as will be seen later, is not a pure example since it does not contain any reference to Art. 36 of the Statute.

5. The second paragraph of Article 36 provides that the acceptance can be made for 'all legal disputes . . .', whereas the old Statute mentioned 'all or any classes of legal disputes . . .'. This change was intended to clarify the text and to enlarge the scope of the jurisdiction of the Court.[1] It is doubtful whether this limitation is even now very happily drafted. In the first instance, it is now generally recognized that it is far from easy to lay down what is a legal dispute. All disputes are legal and political at the same time, according to the approach one has to the problems involved. Any dispute is legal if the parties disagree as to the meaning of the law as it is; any conflict may be characterized as political if the parties desire to change the law.[2] Moreover, Article 38, paragraph 2, gives the Court the right to decide *ex aequo et bono* if the parties should so request. Such a solution by the Court would certainly be *extra legem*, and probably *contra legem*. It is not to be presumed, however, that the wording of Article 36, paragraph 2, really intends to rule out this possibility. Therefore it may be said that the formulation of this paragraph is not entirely logical. The Permanent Court of International Justice once stated that it could deal with matters that were not questions of international law.[3] When the Statute was revised in 1945 Article 36 was kept in its present form mainly for the reasons that it had created no practical difficulties and that it was better to keep a well-known provision—although not perfect in form—than to draft a new article which might give rise to doubts and to restrictive interpretations.

The actual wording of the Article and the enumeration of the classes of disputes have been taken from the Conventions on Pacific Settlement of Disputes of 1899 and 1907, and from the Covenant of the League of Nations. The Committee of Jurists in 1920 recommended the rule of compulsory jurisdiction,[4] whereas the Council of the League of Nations reversed that decision. The text of Article 36 of the Statute of the Permanent Court of International Justice was the result of a compromise.[1] The same arguments which were used during the elaboration of the Statute of the Permanent Court[2] were repeated and enlarged upon during the debates in Washington and San Francisco in 1945.[3] The Statute of the International Court of Justice—as foreshadowed in the Dumbarton Oaks Proposals—was based on the Statute of the Permanent Court. Many proposed changes were discussed;[4] and some important debates took place concerning the advisability of introducing obligatory jurisdiction. The Committee of Jurists in Washington, whose task was a technical and not a political one, decided not to take up a definite position on this matter of principle, but proposed two alternatives for Article 36, and presented a report which said:[5]

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[1] *U.N.C.I.O.*, vol. xiii, p. 558.

[2] The term 'legal' is not, it is submitted, influenced by the smaller or greater political importance of the subject-matter.

[3] See, for example, *Serbian Loans* case, *P.C.I.J.*, Series A, No. 20/21, p. 19.

[4] *P.C.I.J.*, Advisory Committee of Jurists: *Procès-verbaux of the Proceedings of the Committee*, 16 June–24 July 1920.

> 'The suggestion was made by the Egyptian delegation to seek a provisional solution in a system which, while adopting compulsory jurisdiction as the compulsory rule, would permit each State to escape it by a reservation. Rather than accept this view, the Committee has preferred to facilitate the consideration of the question by submitting two texts as suggestions rather than as a recommendation.
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> 'One is submitted in case the Conference should not intend to affirm in the Statute the compulsory jurisdiction of the Court, but only to open the way for it by offering the States, if they did not think it apropos, acceptance of an optional clause on this subject. This text reproduces Article 36 of the Statute with an addition in case the United Nations Charter should make some provision for compulsory jurisdiction.
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> 'The second text, also based on Article 36 of the Statute, establishes compulsory jurisdiction directly without passing through the channel of an option which each State would be free to take or not to take. Thus it is simpler than the preceding one. It has even been pointed out that it would be too simple. The Committee, however, thought that the moment had not yet come to elaborate it further and see whether the compulsory jurisdiction thus established should be accompanied by some reservations, such as one concerning differences belonging to the past, one concerning disputes which have arisen in the present war, or those authorized by the General Arbitration Act of 1928. If the principle enunciated by this second text were accepted, it could serve as a basis for working out such provisions applying the principle which it enunciates with such modifications as might be deemed opportune.'

Later, the same question was debated at the San Francisco Conference, where a special sub-committee[6] was appointed for the study of compulsory or optional jurisdiction. The Sub-Committee reached the conclusion that:

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[1] League of Nations/P.C.I.J., Documents concerning action taken by the Council of the League of Nations under Art. 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court of International Justice, particularly pp. 44 ff. and 57.

[2] For the history before the Second World War see Hudson, op. cit., pp. 383 ff., and *Statut et Règlement de la Cour permanente de Justice internationale* (1934), pp. 239–71.

[3] See chap. ix of *I.C.J. Year Books* for bibliography. See also Hudson in *A.J.* 41 (1947), and Vulcan, op. cit.

[4] For instances see *U.N.C.I.O.*, vol. xiv, p. 300 (China), vol. xiii, p. 486 (France), ibid., p. 487 (New Zealand), and ibid., p. 489 (Venezuela).

[5] Ibid., vol. xiv, pp. 667–8.

[6] Ibid., vol. xiii, pp. 553 ff.

> 'The desire to establish compulsory jurisdiction for the Court prevailed among the majority of the subcommittee. However, some of these delegates feared that insistence upon the realization of that ideal would impair the possibility of obtaining general accord to the Statute of the Court as well as to the Charter itself. It is in that spirit that the majority of the subcommittee recommends the adoption of the solution described above.'[1]

The Committee also adopted unanimously a resolution requesting the states parties to the Statute to make declarations under Article 36 as soon as possible.[2] In the course of the Conference at San Francisco the Plenary Meeting of the Conference adopted this resolution, calling upon the Members to accept the compulsory jurisdiction of the Court.[3] It is useful to keep in mind the history of this article in case doubts should arise in applying or interpreting it. The aim of the provision is clearly to facilitate the continual development of compulsory jurisdiction.[4]

6. The jurisdiction of the Court at present—as during the existence of the Permanent Court—is invariably based on the consent of the parties. It is clear that the Court has no other jurisdiction than that conferred upon it by the parties. On the other hand, it is equally clear, according to the practice of the old and the new Court, that it is immaterial in which way and at what time the consent is given. In the *Upper Silesia Minority Schools* case the Permanent Court said:[5]

> 'The Court's jurisdiction depends on the will of the parties. The Court is always competent once the latter have accepted jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it.'

In the same Judgment the Court stated that it was immaterial in what form the consent had been given,[6] and the International Court of Justice repeated that statement in the same words in its Judgment in the preliminary objection in the *Corfu Channel* case:[7]

> 'Furthermore, there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by special agreement. As the Permanent Court of International Justice has said in its Judgment No. 12 of April 26th, 1928, page 23: The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement.'

7. One of the most interesting phenomena in connexion with the compulsory jurisdiction of the Court is the great number of reservations which

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[1] *U.N.C.I.O.*, vol. xiii, p. 559. [2] Ibid., p. 392. [3] Ibid., vol. i, p. 627.

[4] See also the clear and categorical statement of Hudson, op. cit., p. 450.

[5] *P.C.I.J.*, Series A, No. 15, p. 22. [6] Ibid., p. 23. [7] *I.C.J. Reports*, 1947–8, p. 28.

states have used to safeguard their interests when accepting the jurisdiction of the Court. In addition, certain states[1] have made their declarations subject to ratification. It is not necessary to examine here the importance of ratification in international law. It is sufficient to state that the declarations will be valid without ratification if nothing is said about ratification.[2] Secondly, it is interesting to note that certain states[3] have accompanied their declarations by an express reference to the national act which authorizes the acceptance of the jurisdiction. This, too, is a matter of domestic concern. It is not to be assumed that such a reference or the absence of it are of importance for the validity of the declaration.[4]

8. The next question which arises is that of the entry into force of these declarations.[5] While this question has not been of any practical importance in the past, it may easily become of importance for two reasons. First, it may happen that the declarations are valid only for future disputes; and secondly, they often contain a reservation as to the time for which they are valid. It is clearly impossible to know when a declaration lapses if it is not known when its validity begins. Certain states have expressly laid down a particular date from which the declaration shall be valid.[6] In this case no doubt is possible. Other states[7] make the matter equally clear by stipulating that the obligation starts from the date of signature. Others, again, make the deposit of the declaration the operative date.[8] Several states mention the date of ratification,[9] whereas others have made no ruling whatever.[10]

There seem to be two possible solutions in cases when nothing is stated in the declaration itself. Either the declaration can enter into force the moment it is signed or ratified, as the case may be, or it enters into force the moment it has been deposited with the Secretary-General. The Permanent Court of International Justice has never been called upon to settle the problem; but it may happen that the International Court of Justice will have to decide this matter as well as all other matters concerning its own jurisdiction. It seems natural that the declaration enters into force the moment it has been signed or ratified. This, however, entails the danger that the declaration may be valid without being known to anyone. It might therefore be safer to accept the rule that it enters into force on the date it is deposited with the Secretary-General.

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[1] Belgium (see *I.C.J. Year Book*, 1947–8, p. 131); Canada (ibid., 1946–7, p. 208); Dominican Republic (p. 208); France (p. 220).

[2] Hudson, op. cit., p. 452.

[3] Brazil (*I.C.J. Year Book*, 1947–8, p. 130); Honduras (p. 129); Pakistan (p. 131); Philippines (p. 128); Paraguay (p. 127); Switzerland (p. 138); and United States of America (ibid., 1946–7, p. 218).

[4] It is not necessary to enter into a discussion here as to the effect of a declaration which, in accordance with international law, might be valid although it is not delivered according to the constitutional rules of the country concerned. The Permanent Court expressed an important opinion on such a point in its Judgment in the *Case concerning the Legal Status of South-Eastern Greenland* (*P.C.I.J.*, Series A/B, No. 53, p. 71).

[5] See Hudson, op. cit., p. 452.

[6] Mexico (*I.C.J. Year Book*, 1947–8, p. 129); Netherlands (ibid., 1946–7, p. 217); Norway (p. 219); Philippines and Turkey (ibid., 1947–8, p. 128).

[7] Australia (ibid., 1946–7, p. 216); India (p. 213); New Zealand (p. 214); South Africa (p. 215); Sweden (p. 220); United Kingdom (pp. 212 and 217); Bolivia (ibid., 1947–8, p. 131).

[8] Denmark (ibid., 1946–7, p. 219); Brazil (ibid., 1947–8, p. 130); and Honduras (p. 129).

[9] Belgium (ibid., p. 131); France (ibid., 1946–7, p. 220).

[10] China (ibid., p. 218); Colombia (p. 212); Dominican Republic (p. 208); Guatemala (p. 219); Haiti (p. 207); Nicaragua (p. 210); Panama (p. 207); Paraguay (p. 211); United States (p. 218); Uruguay (p. 207); Pakistan (ibid., 1947–8, p. 132).

It is laid down in paragraph 4 of Article 36 of the Statute that:

> 'Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.'

It might consequently be argued that the deposit is a part of the legal act and that the declaration is not complete without it.[1] This line of argument seems also to be supported by reference to Article 102 of the Charter of the United Nations, which states in its second paragraph:

> '2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.'

It is clear that these declarations fall within the term 'treaty' in this article;[2] and that the International Court of Justice is an organ of the United Nations. It would then be natural to say that these declarations are valid from the moment when they are deposited, and not before. It is believed that these declarations, which are registered *ex officio* by the Secretariat of the United Nations, will be registered at once so that there will be no discrepancy between the date of deposit and the date of registration. It is possible, however, that a declaration may be valid from the date of deposit, although it cannot be invoked before it has been registered.

9. Only two conditions are envisaged in Article 36 of the Statute. The first refers to the period of the validity of the declaration. It is perhaps not strictly accurate to refer to a time-limit as a condition. The declaration in question is wholly valid, with or without reservations, conditions, or exceptions, within the time-limit fixed. Certain states have fixed the period

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[1] It may, of course, be argued that this paragraph is 'only a detail of housekeeping', as Professor Hudson says (*A.J.* 40 (1946), p. 34). The fact remains, however, that the paragraph requires that the declaration shall be deposited. Such a rule will only be completely useful if the validity dates from the deposition.

[2] See the resolutions of the General Assembly, published in the first volume of *United Nations Treaty Series*. See also Goodrich and Hambro, *Charter of the United Nations* (Revised Edition, Boston, 1949), pp. 513 ff., commentary to Art. 102.

of time for which they wish to be bound. Some have accepted for ten,[1] six,[2] or five[3] years, with no mention of notice or renewal. Others have accepted the same time-limits, namely, ten,[4] six,[5] or five[6] years, with the additional condition that the declaration shall be valid even after that time until notice is given; others again have added that the notice shall take effect only six months after it is given.[7] One state has fixed the duration for five years; three states have made special rules. Of these, Luxemburg[8] has made the declaration valid for five years, with the proviso that it shall be regarded as renewed for a similar period if it is not denounced within six months of the expiry of that period. This renewal can continue indefinitely. The Swiss declaration[9] continues until it is 'abrogated subject to one year's notice'. South Africa[10] has made the declaration valid 'until such time as notice may be given to terminate the acceptance'. No time-limit is given for such notice. Some states[11] have made the declaration without any time-limit whatsoever and without anything being said as to the possibility of giving notice. All these declarations were made under the régime of the Permanent Court of International Justice, whereas all subsequent declarations after the establishment of the United Nations have included a statement of abrogation in one form or another.

It is interesting, and may be important, to know if and how such declarations can be terminated. One state[12] attempted to give notice when it terminated its membership in the League of Nations, but several of the other signatories protested against this action.[13] Such denunciation, therefore, can hardly be treated as a precedent. It might be reasonable to state that the abrogation or expiry of the declaration will be subject to the general rules covering termination of treaties.[14] This would seem to indicate that the declaration would cease to be valid if the state concerned obtained the consent of all the other states which had filed such declarations. Even this, however, seems somewhat doubtful. It may be said that the states filing declarations under Article 36 without any time-limit have taken on obligations towards all the signatories to the Statute. If consent should be given by all the signatories, the obligation would seem to have been validly terminated. Furthermore, it would seem to be terminated in the (controversial) case of *clausula rebus sic stantibus*. Thus if a state should cease to be a Member of the United Nations it might be said that the clause *rebus sic stantibus* would come into operation,[1] but even this is not certain since it is possible, as has been shown above, to be a signatory of the Statute without being a Member of the United Nations. In any case it seems difficult to accept unilateral denunciation without very strong reasons.

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[1] Denmark (*I.C.J. Year Book*, 1946–7, p. 219); Norway (p. 219); Siam (p. 208); Sweden (p. 220).

[2] Honduras (ibid., 1947–8, p. 129).

[3] Belgium (ibid., p. 130); Bolivia (p. 131); Brazil (p. 130); Turkey (p. 128); Guatemala (ibid., 1946–7, p. 219).

[4] Canada (ibid., p. 208); Netherlands (p. 217); Philippines (ibid., 1947–8, p. 128).

[5] Iran (ibid., 1946–7, p. 211).

[6] Australia (ibid., p. 216); China (p. 218); France (p. 220); India (p. 213); New Zealand (p. 214); United Kingdom (p. 212); United States (p. 218); Mexico (ibid., 1947–8, p. 129); Pakistan (p. 131).

[7] China, Mexico, Pakistan, and the United States (see preceding footnote) and Luxemburg (ibid., 1946–7, p. 210).

[8] Ibid., p. 210.

[9] Ibid., 1947–8, p. 132.

[10] Ibid., 1946–7, p. 215.

[11] Colombia (ibid., p. 212); El Salvador (p. 210); Dominican Republic (p. 208); Haiti (p. 207); Nicaragua (p. 210); Panama (p. 207); Paraguay (p. 211); Uruguay (p. 207).

[12] Paraguay. See *P.C.I.J.*, Ser. E, No. 14, p. 57, and No. 15, p. 227. See also Hudson, op. cit., p. 476.

[13] See Hudson, op. cit., p. 476. Professor Hudson also relates that several states protested against the unilateral reservations made by the members of the British Commonwealth of Nations at the outbreak of the Second World War.

[14] See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), pp. 840 ff.

10. The actual wording of the provisions of Article 36 concerning reservations in the declarations accepting the compulsory jurisdiction of the Court is clear. It is unequivocally stated there that two reservations may be made. This would seem to mean that it is legally impossible to make other reservations. It is equally clear, however, that a long and unbroken practice has rejected that interpretation. Not only have states made reservations of different kinds, but the Assembly of the League of Nations discussed the reservations at different times and definitely adopted the point of view that exceptions should be permitted so as to facilitate acceptance of the 'optional clause'.[2] It is contested in the literature that states can make more exceptions than the two expressly provided for.[3] However, the subsequent practice of states is of greater importance than writings of publicists. Even if this practice were not considered long enough or uniform enough to create customary international law, it would certainly be considered an important element of interpretation.[4]

Still more important is a declaration which was adopted by the Sub-Committee and later incorporated into the report of the Rapporteur of Committee IV/1 at the San Francisco Conference:[5]

> 'The question of reservations calls for an explanation. As is well known, the article has consistently been interpreted in the past as allowing States accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has, therefore, been considered unnecessary to modify paragraph 3 in order to make express reference to the right of the States to make such reservations.'

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[1] See Goodrich and Hambro, op. cit. (Revised Ed.), pp. 142 ff., Commentary to Art. 6 of the Charter. See also Kelsen, 'Withdrawal from the United Nations', in *Western Political Quarterly*, i (1948), pp. 29 ff.

[2] See Hudson, op. cit., pp. 452–3.

[3] See Vulcan, op. cit., p. 41, with quotations.

[4] See Pollux in this *Year Book*, 23 (1946), p. 78.

[5] *U.N.C.I.O.*, vol. xiii, pp. 391–2.

In spite of this, however, it is better, from the point of view of the progressive development of international jurisdiction, that the declarations be made without any reservations, and this has in fact happened[1]—though only under the régime of the Permanent Court of International Justice. However, all states which have subsequently accepted the compulsory jurisdiction have made at least the reservation of reciprocity.

11. The most frequent reservation, apart from that of reciprocity—which is treated in other parts of this article[2]—is the reservation excluding previous disputes. There are two main reservations of this kind. The reservation made by Australia[3] is fairly wide:

> '. . . over all disputes arising after August 18th, 1930, with regard to situations or facts subsequent to the said date. . . .'

This form of reservation is employed by some states,[4] whereas a smaller number of states[5] has made use of the less drastic reservation expressed by the United States:[6] 'in all legal disputes hereafter arising . . .'. It is clear that the first and broader of these two formulations can be alarmingly comprehensive.[7] It is, indeed, difficult to imagine any great number of international conflicts that are completely divorced from situations or facts prior to the entry into force of such a declaration. Even the narrower reservation can be difficult to apply at certain times because it may not be easy to define the scope of a conflict so as to be sure that it is in a real sense 'arising hereafter'. From the point of view of the jurisdiction of the Court, it would certainly be better that this reservation were not made. It frequently happens in the life of states that disputes take a long time to mature. Lengthy diplomatic negotiations take place before it is finally decided that the conflict has become definite enough and concrete enough to be formulated as claim and counterclaim before an international tribunal. The Court might, therefore, be most useful when called upon to deal with older claims and conflicts.[8]

In the absence of an express reservation it should be clear that the Court would be competent also in regard to conflicts of long standing. The

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[1] Haiti (*I.C.J. Year Book*, 1946–7, p. 207); Nicaragua (p. 210); and Paraguay (p. 211).

[2] See above, § 4, and below, § 15.

[3] *I.C.J. Year Book*, 1946–7, p. 216.

[4] Canada (ibid., p. 208); Colombia (p. 212); France (p. 220); India (p. 213); Luxemburg (p. 210); New Zealand (p. 214); South Africa (p. 215); Sweden (p. 220); and United Kingdom (p. 212). It is worth noting, however, that the British Government, which found it necessary to make this special reservation in its general declaration, found it more useful not to repeat it in its special declaration accepting the jurisdiction of the Court for the Belize dispute.

[5] The Netherlands (ibid., p. 217); United States (p. 218); Belgium (ibid., 1947–8, p. 124); Pakistan (p. 125); Turkey (p. 124).

[6] Ibid., 1946–7, p. 213.

[7] See Vulcan, op. cit., p. 46.

[8] Professor Hudson has dealt with this reservation: see op. cit., pp. 468–9.

Permanent Court of International Justice twice had occasion to interpret such reservations; and the findings of the Court in both cases show the difficulties and dangers of such reservations. In the *Phosphates in Morocco* case the Court said, *inter alia*:[1]

> 'The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case. However, in answering these questions it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real cause of the dispute.'

In discussing the same reservation, in the case of the *Electricity Company of Sofia and Bulgaria*, the Court said, *inter alia*:[2]

> 'It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute. In the present case it is the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities with regard to a particular application of the formula—which in itself has never been disputed—which forms the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose.'[3]

12. Reservations concerning other means of pacific settlement have in one form or another been made by a number of states.[4] One such example is the declaration made by Pakistan:[5]

> '. . . provided, that this declaration shall not apply to
> (*a*) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future. . . .'

In addition, Iran[6] and the members of the British Commonwealth of Nations[7] have made a special reservation concerning disputes pending before the Council of the League of Nations. Another frequent reservation refers to multilateral treaties.[1] The declaration of the United States of America makes a reservation in this respect which tends to be all-embracing:[2]

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[1] *P.C.I.J.*, Series A/B, No. 74, p. 24.

[2] Ibid., No. 77, p. 82.

[3] Further comments on the practice of the Permanent Court of International Justice in regard to these and other reservations will be found at the end of the discussion on the declarations under Art. 36.

[4] Australia (*I.C.J. Year Book*, 1946–7, p. 216); Belgium (ibid., 1947–8, p. 131); Canada (ibid., 1946–7, p. 209); France (p. 220); India (p. 213); Iran (p. 211); New Zealand (p. 214); Pakistan (ibid., 1947–8, p. 131); Siam (ibid., 1946–7, p. 208); South Africa (p. 215); Turkey (ibid., 1947–8, p. 218); United Kingdom (ibid., 1946–7, p. 212); United States (p. 218).

[5] Ibid., 1947–8, p. 131.

[6] Ibid., 1946–7, p. 211.

[7] Australia (ibid., p. 216); Canada (p. 209); India (p. 213); New Zealand (p. 214); South Africa (p. 215); and United Kingdom (p. 212).

> '(*c*) disputes arising under a multilateral treaty, unless (1) the Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.'

All these reservations are of the same kind, since they reserve the possibility to choose other means of pacific settlement. Wide differences of opinion are not likely to manifest themselves in the interpretation of such reservations. Much more difficult are the questions which may arise if no such reservation is made.

In the first instance, there arises the question as to what would be the situation in the Security Council if there were no such reservation. Could a state deny the competence of the Security Council to deal with a dispute because it, as well as the other party, has accepted the compulsory jurisdiction of the Court? The answer is clearly in the negative. The Security Council has an overriding authority in case of 'any threat to the peace, breach of the peace, or act of aggression', as is laid down in Article 39 of the Charter. If there is no such threat to the peace, then the system of Chapter VI of the Charter comes into operation.[3] The whole scheme of that chapter is directed to permitting the parties themselves to find a peaceful solution to their disputes. Article 36 of the Charter envisages compulsory jurisdiction, inasmuch as its second and third paragraphs provide:

> '2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
>
> '3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.'

✓ There are many other possible conflicts between recourse to the International Court of Justice, on the one hand, and to other agencies for peaceful settlement, on the other. States may conclude special treaties concerning pacific settlement of disputes both before and after having accepted the compulsory jurisdiction of the International Court of Justice. The problem would seem to be different in the two cases.

Possible conflicts between the compulsory jurisdiction of the Court and other means of settlement adopted specifically by the same parties were discussed exhaustively during the elaboration of the Charter of the International Trade Organization,[1] but it may well be that too much importance has been attributed to this problem. For after all, the acceptance of the jurisdiction of the Court never compels two states to bring their disputes before the Court. It only means that one party to a dispute cannot refuse to appear before the Court if the other party desires to bring the matter before it. The two states concerned can always agree on any other method of peaceful settlement, or even not to attempt a settlement at all. Moreover, it frequently happens that two states which have both accepted the jurisdiction of the Court nevertheless conclude a special agreement with a view to defining the issues, instead of bringing the conflict before the Court by unilateral application. Therefore the number of cases actually brought before the Court in pursuance of a declaration under Article 36 of the Statute are relatively few.[2]

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[1] Pakistan (*I.C.J. Year Book*, 1947–8, p. 132) and United States (ibid., 1946–7, p. 218).

[2] Ibid., p. 218.

[3] See Goodrich and Hambro, op. cit. (Revised Ed.), Comment on Chapter VI. See also Eagleton, 'The Jurisdiction of the Security Council over Disputes', in *A.J.* 40 (1946), pp. 513 ff.; Goodrich, 'Pacific Settlement of Disputes', in *American Political Science Review*, 39 (1945); and Kelsen, 'The Settlement of Disputes by the Security Council', in *International Law Quarterly*, 2 (1948), pp. 173 ff.

It could, nevertheless, happen that a state which has accepted the compulsory jurisdiction of the Court may later have agreed to other means of settlement, but for certain reasons might prefer to bring a matter before the Court. The other party having first accepted the jurisdiction of the Court and later having concluded a treaty for other means of settlement, might then refuse to appear before the Court on the ground that the later special treaty had abrogated the former acceptance. Such conflicts ought to be solved according to the general rules as to conflicts between treaties.[3] It might be said that the later treaty ought to prevail, since it might be considered to have abrogated the former. It might also be said that the special treaty in its particular domain abrogates the more general treaty. On the other hand, it might be argued that the declarations filed under Article 36 of the Statute in reality become a part of the treaty-law of the United Nations, since the Statute of the Court is a part of the Charter. In such a case, according to Article 103,[4] the Charter should prevail.

There are also possibilities of conflict between declarations made under Article 36 and previous treaties of a special nature. In such cases it would be natural to say that the declarations under Article 36 abrogate the former treaties. That problem did in fact arise under the régime of the Permanent

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[1] See the following documents from the Interim Commission of the I.T.O.: Limited C. I.C.I.T.O./EC.2/SC 1/3 ff. and 2/5 and 2/17.

[2] See as to this Hudson, op. cit., pp. 477 ff. See also the list of cases brought before the Court by special agreement and by application in the last Annual Report of the Permanent Court of International Justice (*P.C.I.J.*, Series E, No. 16, pp. 43 and 52).

[3] Comment on this problem will be found in most general works on international law and in all works on treaties. See also the bibliography by Pollux in this *Year Book*, 23 (1946), at p. 54, n. 3. And see Guggenheim, *Lehrbuch des Völkerrechts*, vol. i (1948), pp. 101 ff.

[4] That article provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

Court.[1] However, the judicial decisions are too few in number to render possible a definite conclusion in this matter.

13. The next important reservation is that aiming at the exclusion of questions within the domestic jurisdiction of the country in question. Strictly speaking, no such reservation is necessary. The Court will itself take into consideration whether a matter is of this character. Such a reservation, therefore, may be quite harmless; but it is clearly preferable that it should not be made at all.[2] However, the reservation found a place in the Covenant of the League of Nations, which provided in Article XV, paragraph 8:

> 'If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.'

Certain of the signatories to the Statute of the Permanent Court of International Justice[3] made reservations in respect of 'disputes with regard to questions which by international law fall exclusively within the domestic jurisdiction . . .'. The San Francisco Conference omitted the reference to international law in Article 2, paragraph 7.[4] The American *Report to the President* explained this in the following words:[5]

> 'The present text omits reference to "international law", found in the Dumbarton Oaks Proposals, as the test whether or not a matter is "domestic". This deletion was supported by the argument that the body of international law on this subject is indefinite and inadequate. To the extent that the matter is dealt with by international practice and by text writers, the conceptions are antiquated and not of a character to be frozen into the new Organization.'

Article 2, paragraph 7, of the Charter has given rise to a new and far-reaching exception, first contained in the United States declaration and later followed by others.[6] The reservation of the United States removes from the compulsory jurisdiction of the Court:[7]

> '. . . disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America. . . .'

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[1] See Hudson, op. cit., pp. 469–70.

[2] This was clearly pointed out in the official Norwegian Comment on the Dumbarton Oaks Proposals (see *U.N.C.I.O.*, vol. iii, p. 371. See also Lauterpacht in *Economica*, 1930, pp. 148 ff.).

[3] Australia (*I.C.J. Year Book*, 1946–7, p. 216) and other members of the British Commonwealth of Nations.

[4] See Pollux in *Acta Scandinavica Juris Gentium*, 1946, pp. 13 ff., especially the bibliography in n. 1, pp. 30–1. See also Goodrich and Hambro, op. cit., and Fincham, *Domestic Jurisdiction* (1948).

[5] See Department of State Publication 2349, Conference Series, 71, pp. 44–5.

[6] France (*I.C.J. Year Book*, 1946–7, p. 220); Mexico (ibid., 1947–8, p. 129); and Pakistan (ibid., p. 132).

[7] Ibid., 1946–7, p. 218.

It is immediately obvious that such a reservation can be a source of great danger. It was strongly criticized by many members of the United States Senate.[1] It must be difficult for any foreigner to judge whether this reservation was or was not necessary in order to secure the Senate's ratification of the declaration of acceptance. However, it is not without interest to quote the following passage by Professor Preuss, writing in the *American Journal of International Law*:[2]

> 'Inclusion of the Conally Amendment leaves the United States in substantially the position it has occupied under earlier treaties of obligatory arbitration, which is "obligatory as long as there is no dispute, but becomes optional as soon as one has arisen".[3] In view of legitimate expectations of substantial progress which had been aroused by the relatively unanimous approval of the principle of compulsory adjudication, both in official quarters and in public opinion, the reversion of the United States to a previous practice constitutes a retrogressive step.'

The debate over the American declaration of 1946 will remind the student of a similar debate concerning the British declaration of 1930. The present Editor of the *British Year Book of International Law* wrote a searching article on that subject which well merits to be quoted to-day.[4] His remarks are significant inasmuch as he attacked the British domestic jurisdiction reservation because it might in some distant future be interpreted as reserving for Great Britain the right to decide which questions did and which did not fall under the reservation. But the British declaration did not claim *expressis verbis* such a privilege as the United States and other states have done subsequently. Professor Lauterpacht said in this connexion:[5]

> 'These arguments have been adduced here, not because we believe them to be sound in law, but in order to draw attention to the possibility of their being put forward and creating uncertainty. In the writer's opinion, the Court would overrule them on the ground that the last paragraph of Article 36[6] is an essential part, not only of that Article, but of every scheme of truly obligatory jurisdiction; that to deprive the Court of the power to determine its scope of competence, and to leave that right to the interested parties, is to deny the essence of the obligation to arbitrate; that a party signing the Optional Clause runs, apart from other risks, the risk that another State may bring before the Court any dispute on the ground that it falls within one of the four categories enumerated therein; and that the idea of a highest international tribunal implies, as an essential condition of its proper functioning, the confidence on the part of the States that it will not become guilty either of usurpation of powers or of a disregard of international law.'

[1] See also articles by Hyde, Preuss, and Wilcox in *A.J.* 40 (1946).

[2] Vol. 40 (1946), p. 736.

[3] [From Preuss, op. cit., quoting] Baron Marshall von Bieberstein, German Delegate to the Hague Conference of 1907, in proposing a plan for an 'obligatory compromise as the complement of obligation arbitration' (*Proceedings of the Hague Peace Conference of 1907*, vol. i (1920), p. 378).

[4] Lauterpacht, 'The British Reservations to the Optional Clause', in *Economica*, 1930, pp. 137 ff.

[5] Ibid., p. 154.

[6] It still is the last paragraph: '6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'

Later in the same article the learned writer argues that the Court will accept that reservation as it accepts other formal reservations to multilateral treaties: but[1]

> 'Possibly it might be argued that sweeping and indefinite reservations might be regarded as contrary to the very purpose of the Optional Clause and as such invalidating the signature. As such, for instance, might be regarded a reservation offending against the fundamental principle of the Statute of the Court in regard to its right to determine its own jurisdiction.'

It is clear that the American reservation creates a considerable difficulty. The Government of the United States has accepted the compulsory jurisdiction with the reservation that the United States remains free to decide what is and what is not within the domestic jurisdiction of the United States. Moreover, the Permanent Court of International Justice has laid down the rule that instruments conferring jurisdiction on the Court shall be given a restrictive interpretation.[2] On the other hand, it is equally clear that the Court must give an interpretation that does not completely nullify the declarations. It is difficult, indeed, to venture any prophecy as to the course to be adopted by the International Court of Justice. It is to be hoped that the state in question will give a reasonable interpretation of the pertinent reservation and will only apply it *uberrima fide*.[3]

14. Certain states which had previously accepted the compulsory jurisdiction of the Permanent Court have made reservations to the effect that disputes having their origin in the Second World War should be excluded.[4] 7 The protests raised against such reservations were based on the fact that the reservations were made subsequent to the entry into force of the declarations of acceptance of the jurisdiction of the Court.[5] There have been other reservations, of a different nature, which are much less disturbing in their effect for the reason that they are less likely to be copied by other states. The declaration of Iran[6] states that the Court has jurisdiction as to such situations or facts only as directly or indirectly concern the application of treaties or conventions accepted by Iran after the ratification of the declaration. Besides this sweeping reservation, found in the very body of the declaration, the declaration contains many other reservations. The most striking of these excepts all disputes concerning the territorial status of Persia.[7] This last reservation is in the same class as the more general reservations, often made in earlier arbitration treaties, of 'vital interests',

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[1] At p. 169.

[2] *P.C.I.J.*, Series A/B, No. 46, p. 138.

[3] See Spiropoulos in *Revue hellénique de Droit international*, 1 (1948), pp. 1 ff.

[4] For the text see *I.C.J. Year Book*, 1946–7.

[5] Hudson, op. cit., p. 476.

[6] See *I.C.J. Year Book*, 1946–7, p. 211.

[7] 'Persia' in this connexion refers to the whole state of Iran. The declaration was signed in 1930, when the official name of the state was still Persia.

'honour', 'independence', 'sovereignty', and so on.[1] Such reservations have generally not survived the First World War. The above-mentioned Iranian declaration is one exception. Another is furnished by El Salvador,[2] which excepts 'questions which cannot be submitted to arbitration in accordance with the political constitution of this Republic'. The same declarations also except disputes as to 'pecuniary claims made against the nation'.

Finally, a number of states[3] have inserted a special reservation to the effect that only legal claims can be submitted.[4] The relevance of such a stipulation is doubtful seeing that the declarations are made with reference to the second paragraph of Article 36 of the Statute, which itself stipulates that the obligation can only be assumed for legal disputes.

15. The reservation of reciprocity is made in many different forms. Eighteen states have accepted the obligation towards all other states which have accepted the same obligation.[5] Other states have assumed the obligation in regard to certain other states or Members,[6] whereas France has accepted the obligation only in relation to other Members of the United Nations, thereby excluding the states which—like Switzerland—become signatories to the Statute without being Members of the United Nations.[6] Finally, it should be mentioned that the members of the British Commonwealth of Nations have made the express reservation that disputes among themselves should not come before the Court.[7]

Certain states use the word 'reciprocity'; others speak of 'strict reciprocity'.[8] It is not always easy to determine what reciprocity means. It is clear that a state which has accepted the jurisdiction of the Court on condition of reciprocity is only bound towards other states which have also undertaken this obligation. It is possible to say that State A, having accepted the compulsory jurisdiction of the Court with reservations *x*, *y*, and *z*, is bound towards all other states and that it can invoke the said exceptions *x*, *y*, and *z* and none other towards all other states which have in one form or another accepted the compulsory jurisdiction of the Court. Norway and Denmark, for example, have accepted the jurisdiction of the

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[1] Dr. Habicht (*Post-War Treaties for Pacific Settlement of International Disputes* (1931)) gives many examples of such reservations even in later treaties: see pp. 992–3.

[2] See *I.C.J. Year Book*, 1946–7, p. 210.

[3] Professor Hudson (op. cit., p. 450) has some interesting remarks on this special point.

[4] China (*I.C.J. Year Book*, 1946–7, p. 218); Denmark (p. 219); El Salvador (p. 210); Guatemala (p. 219); Iran (p. 211); Luxemburg (p. 210); Norway (p. 219); Sweden (p. 220); United Kingdom, for the Belize question (p. 217); United States (p. 218); Bolivia (ibid., 1947–8, p. 131); Brazil (p. 130); Honduras (p. 129); Pakistan (p. 131); Mexico (p. 129); Philippines (p. 128); Switzerland (p. 132); Turkey (p. 128).

[5] For instance, Belgium (ibid., 1947–8, p. 131); Dominican Republic (ibid., 1946–7, p. 208); Netherlands (p. 217); Panama (p. 208); Siam (p. 208); Uruguay (p. 207).

[6] See ibid., p. 220.

[7] For the text see ibid., chap. x.

[8] E.g., Mexico (ibid., 1947–8, p. 129).

Court with the sole reservation of reciprocity. It is agreeable that those two states are willing to be cited before the Court in regard to all legal disputes as described in Article 36 of the Statute; undoubtedly other states have made additional reservations, but that fact does not materially alter the Danish or Norwegian obligation. These states have shown their confidence in the International Court of Justice and have deliberately taken the risk of being sued before that high tribunal. On the other hand, it may be argued that reciprocity means reciprocity in all ways and so far as all reservations are concerned. This means a cumulative set of reservations. If this interpretation is adopted it follows that State A, having accepted the jurisdiction with reservations x, y, and z, can rely not only on those reservations but also on all other reservations made by other signatories. If an opponent, State B, had assumed the obligation with reservations o, p, and r, it would mean in consequence that States A and B could both reciprocally rely on all of these six reservations, x, y, z, o, p, and r. Such an interpretation would seriously weaken the compulsory jurisdiction of the Court. This, however, is the interpretation which has been accepted by writers[1] and also by the Permanent Court of International Justice. The Permanent Court said, in the *Electricity Company of Sofia* case:[2] 'it is common ground that, in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36 of the Court's Statute and repeated in the Bulgarian declaration', Bulgaria can apply the reservations made by the other party.

16. Neither the Secretary-General of the United Nations, with whom the declarations are to be deposited, nor the Registrar of the Court, to whom they are transmitted, is called upon to decide whether the declarations are valid or not. This can only be done by the Court itself. If protests are lodged,[3] the Registrar can only communicate them to the other parties for their information.

17. Declarations under Article 36 of the Statute do not constitute the only form in which the compulsory jurisdiction of the Court can be accepted. In the first place, it is open to any state to accept the jurisdiction of the Court without any reservation and in respect to any other state regardless of whether such other state has or has not assumed the same obligation. Haiti[4] and Nicaragua[5] seem, indeed, to have done this. Since these two states made the declarations under the régime of the Permanent

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[1] See Hudson, op. cit., pp. 465–6, and Lauterpacht, op. cit., p. 139.

[2] *P.C.I.J.*, Series A/B, No. 77, at p. 81, and see No. 74, p. 22.

[3] This has happened in the past: see Hudson, op. cit., p. 476, and *P.C.I.J.*, Ser. E, No. 14, p. 57, and No. 15, p. 227.

[4] See *I.C.J. Year Book*, 1946–7, p. 207.

[5] Ibid., p. 210.

Court, and since they are both Members of the United Nations, there can be no doubt as to the validity of the declarations. It is even suggested that, in view of the very general nature of the declarations, they are precluded from availing themselves of the reservations laid down by other declarants, and that all other states, whether signatories or not, can accept the same obligation. This, however, does not mean that they can bind other states by such declarations. They can accept the obligation, without obtaining the benefits of the declarants. This is laid down in the resolution of the Security Council referred to above.[1]

18. The most common way in which the compulsory jurisdiction of the Court is accepted is, however, probably in jurisdictional clauses in multilateral or bilateral treaties.[2] A number of such treaties have been concluded since the Second World War,[3] adding to the pre-war treaties which are still valid and which, according to Article 37 of the Statute, confer jurisdiction on the International Court of Justice as the successor of the Permanent Court.[4] Most of these treaties confer jurisdiction on the Court but not exclusively. There the possibility remains of finding other means of peaceful settlement, leaving recourse to the International Court only for cases where the parties cannot agree on another procedure of settlement. The most important of these instruments are, perhaps, those concluded under the aegis of the United Nations, that is, the jurisdictional clauses in the Constitutions of the Specialized Agencies[5] and in the Trusteeship Agreements.[6] Other important agreements are the Pact of Bogota of 30 April 1948,[7] the Brussels Treaty of 17 March 1948,[8] and the treaties concluded under the Marshall Plan.[9]

19. Two further special provisions remain to be considered in connexion with the question of compulsory jurisdiction in the contentious procedure of the Court. The first of these provisions is to be found in Article 62 of the Statute of the Court, which lays down:

> '1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> '2. It shall be for the Court to decide upon this request.'

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[1] See § 3.

[2] Many of the earlier treaties are still in force, according to Art. 37 of the Statute. See *P.C.I.J.*, Series D, No. 6 (4th ed.).

[3] For texts see chap. x of the *Year Books of the International Court of Justice*.

[4] It is not always easy to decide which treaties have remained in force after the Second World War: there are many multilateral treaties where belligerents from both sides were signatories.

[5] See, for example, the Food and Agriculture Organization (*I.C.J. Year Book*, 1946–7, p. 203); the International Refugee Organization (ibid.); and the World Health Organization (ibid., p. 204).

[6] See ibid., pp. 230–1.

[7] For the text see ibid., 1947–8; and see especially pp. 148–9.

[8] See ibid., p. 155.

[9] See the Act of Congress (text printed in *I.C.J. Year Book*, 1947–8). The texts of the subsequent treaties will be printed in the *Year Book* for 1948–9.

There is little practice on this point.[1] But it is clear, in the first instance, that the interest must be legal, and not merely factual or political. Secondly, it is for the Court to decide whether such a legal interest exists. No state can intervene against the will of the Court. On the other hand, once the Court has decided in the affirmative, after having given the states concerned the right to make their views known,[2] the other party cannot validly object to the participation of the intervening state.

While Article 62 leaves a wide discretion to the Court, Article 63 gives a clear right of intervention:

> '1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
>
> '2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.'[3]

In regard to this aspect of the matter practice has been meagre,[4] and no state has so far expressed a desire to intervene in a case before the International Court of Justice.[5] However, it seems clear that intervention may enlarge the compulsory jurisdiction of the Court. If States A, B, and C, for instance, are all parties to a multilateral convention, whereas only States A and B have accepted the compulsory jurisdiction of the Court, State C can intervene and thereby force A and B to plead against it although these two states would otherwise not have been obliged to accept C as a party before the Court.

20. There is no mention of counter-claims in the Statute. However, the Rules of the Court,[6] which apply, interpret, and complete the Statute, contain the following rule in Article 63:

> 'When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject-matter of the application and that it comes within the jurisdiction of the Court. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-

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[1] See Hudson, op. cit., pp. 419 ff.

[2] See Arts. 64 ff. of the Rules of the Court.

[3] Even a state which has not been notified may intervene, according to Art. 66 (1) of the Rules of the Court. This rule enables the Court to rectify any mistake or omission which may inadvertently have been committed by the Registrar.

[4] See Hudson, op. cit., pp. 419 ff.

[5] Notification under Art. 63 was sent by the Registrar to all the Members of the United Nations in connexion with the advisory opinion on admission of new Members. The Members of the United Nations were also informed of the British application and the Albanian objection in the *Corfu Channel* case, where Great Britain relied upon an interpretation of the Charter for the jurisdiction of the Court and this interpretation was challenged by the other party.

[6] The Rules are made in accordance with Art. 30 of the Statute.

matter of the application, the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings.'[1]

The Permanent Court had little opportunity to use this provision,[2] but it has stated that the claim should be 'directly connected with the principal claim'[3] or be 'juridically connected with'[4] it. It seems that counter-claims are only permitted in cases brought by application, and not in cases brought by special agreement, where the parties may be supposed to have made due provision for counter-claims without having to rely on this additional measure of protection.[5] It might be difficult to state in advance whether the Court would admit only so-called 'direct counter-claims', or also 'indirect counter-claims' defined by the Harvard Research Group as follows:[6]

> 'A "counter-claim" is a claim by a respondent against a complainant.
>
> 'A "direct counter-claim" is a counter-claim arising out of the facts or transactions upon which a complainant's claim is based.
>
> 'An "indirect counter-claim" is a counter-claim arising out of facts or transactions extrinsic to those upon which a complainant's claim is based.'

Even if it were conceded—and this is probably the case—that only direct claims are likely to be admitted before the International Court of Justice, and even though the Rules state clearly that counter-claims will only be admitted when they fall within the jurisdiction of the Court, it may still be possible for a counter-claim indirectly to enlarge the jurisdiction of the Court. The practice is so meagre that it is difficult to draw any conclusions and dangerous to lay down any rule. However, it is unlikely that the Court would permit a state which had brought an action by application to withdraw a direct counter-claim from the jurisdiction of the Court with the help of the reservations which it might have made in accepting the jurisdiction of the Court under Article 36.

✓21. The last point to be considered in this article is the possibility of compulsory jurisdiction by means of advisory opinions.[7] At first sight, it seems incongruous to refer to compulsory jurisdiction in connexion with advisory opinions. It is submitted that this term is properly used whenever there is an obligation to request an advisory opinion and provided, further, that the advisory opinion is binding on the parties. While it might seem strange to request an advisory opinion and to decide in advance that such an opinion shall be accepted as binding, such a procedure may nevertheless be very useful. Such stipulation is to be found in the Constitution of the International Labour Organization,[1] in the Convention on Immunities and Privileges of the United Nations,[2] and in the United Nations Headquarters Agreement.[3] However, the most interesting example is that contained in the Charter of the International Trade Organization, Article 96 of which provides:[4]

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[1] For an elucidation of the Court's attitude to counter-claims see *P.C.I.J.*, Series D, No. 2, Fourth Addendum (1943), pp. 261–8.

[2] See Hudson, op. cit., p. 430.

[3] *P.C.I.J.*, Series A/B, No. 70, p. 28.

[4] Ibid., Series A, No. 17, p. 38.

[5] Ibid., Series D, No. 2, p. 139, and third Addendum to that volume, pp. 781, 848, and 871.

[6] See *A.J.*, Supplement, 26 (1932), p. 490.

[7] See Hudson, op. cit., pp. 483 ff. See also the thoughtful article by Goodrich in *A.J.* 32 (1938), pp. 738 ff., and the authoritative lectures at the Hague Academy of International Law given by Judge Negulescu, printed in *Recueil des Cours*, 57 (1936) (iii), particularly pp. 81 ff.

> '1. The Organization may, in accordance with arrangements made pursuant to paragraph 2 of Article 96 of the Charter of the United Nations, request from the International Court of Justice advisory opinions on legal questions arising within the scope of the activities of the Organization.
>
> '2. Any decision of the Conference under this Charter, shall, at the instance of any Member whose interests are prejudiced by the decision, be subject to review by the International Court of Justice by means of a request, in appropriate form, for an advisory opinion pursuant to the Statute of the Court.
>
> '3. The request for an opinion shall be accompanied by a statement of the question upon which the opinion is required and by all documents likely to throw light upon the question. This statement shall be furnished by the Organization in accordance with the Statute of the Court and after consultation with the Members substantially interested.
>
> '4. Pending the delivery of the opinion of the Court, the decision of the Conference shall have full force and effect; provided that the Conference shall suspend the operation of any such decision pending the delivery of the opinion where, in the view of the Conference, damage difficult to repair would otherwise be caused to a Member concerned.
>
> '5. The Organization shall consider itself bound by the opinion of the Court on any question referred by it to the Court. In so far as it does not accord with the opinion of the Court, the decision in question shall be modified.'

Two conclusions can be drawn from this text without much fear of contradiction. The first is that it shows that international organizations can gain direct access to the Court by way of a request for an advisory opinion which shall be considered as binding. This may presumably be done whether the conflict is between two organizations or between an organization, on the one hand, and a state, on the other. By this means much of the difference between states and international organizations in the field of international jurisdiction has been abolished[1] and a step has been taken towards enlarging the conception of 'persons' or 'subjects' of international law.[2] The Havana Charter may seem to go even farther than this. The second paragraph of Article 96 appears to indicate that any one state which deems that its interests have been prejudiced may demand a request for an advisory opinion. This interpretation is by no means undisputed, and it is only mentioned here for the sake of completeness since the wording seems to indicate such a possibility.

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[1] Art. 37, para. 2, provides: 'Any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph.' See *I.C.J. Year Book*, 1946–7, p. 202.

[2] Section 30 provides: 'The opinion given by the Court shall be accepted as decisive by the parties' (ibid., p. 229).

[3] Section 21 provides: 'Thereafter, the arbitral tribunal shall render a final decision having regard to the opinion of the Court.' It was understood that this indicated that the opinion of the Court should be binding as far as legal points were concerned. For the text see ibid., 1947–8, p. 156.

[4] Quoting from the official report, E/Conf. 2/78, United Nations Publications. See also *I.C.J. Year Book*, 1947–8, p. 122. See also the annexes to the Havana Charter.

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[1] See Jenks, 'The Status of International Organisations in relation to the International Court of Justice', in *Transactions of the Grotius Society*, 32 (1946), pp. 1 ff.

[2] See also the pertinent remarks on this subject by Jessup, *A Modern Law of Nations* (1948), p. 155. The General Assembly during the Second Session, held in 1947, debated the position of the Court and passed three resolutions recommending that greater use be made of it. The last of these resolutions recommended the Members of the United Nations to accept in a larger measure than before the compulsory jurisdiction of the Court. See *I.C.J. Year Book*, 1947–8, introductory chapter.

BRITISH NATIONALITY ACT, 1948

By J. MERVYN JONES, M.A., LL.D.

I

BEFORE the passing of this Act, British nationality was based on the common-law doctrine that (subject to certain exceptions) every person born in the King's dominions (i.e. the United Kingdom, a Dominion of the British Commonwealth of Nations, India, the British Colonies, but *not* protectorates, protected states, or mandated territories) was a natural-born British subject. This doctrine became embodied in the Act of 1914, and was there 'embroidered' with other provisions, some already in existence in principle and some entirely new. These provisions laid down the conditions on which persons born *outside* the King's dominions might become natural-born British subjects, the rules regarding naturalization, the status of married women and minor children, and the rules concerning the loss of British nationality. The Act of 1914 consolidated and amended the provisions of earlier Acts, and was itself amended, on certain limited though important points, by Acts of 1922, 1933, and 1943.[1] The Act of 1914 was divided into three parts. Parts I and III were intended to apply to all territories then forming part of the British Empire; Part II could be 'adopted' by the Dominions. Most of the Dominions, however, enacted their own version of the whole of the Act of 1914, but other Dominions left Parts I and III of the Act as part of their own law, adding their own legislation on naturalization. Since the legislation of the Dominions was practically (*mutatis mutandis*) the same as the United Kingdom Act of 1914, these enactments, taken together, constituted, as it was intended they should constitute, a 'common code' of British nationality for the British Commonwealth of Nations, bound together by a common allegiance of British subjects to a common Crown. It was a constitutional understanding that any amendments of this 'common code' should form the subject of discussion amongst members of the Commonwealth so that its standards of uniformity should be maintained.

As a result of the different demands of the various Parliaments of the Commonwealth and of various other factors, it became impossible to maintain this uniformity. Divergencies had already begun to appear between the laws of different members of the Commonwealth even before the outbreak of the Second World War, mainly in connexion with the rules relating to the nationality of married women. The law of the United Kingdom continued to maintain the principle that the wife of a British subject was a British subject, and the wife of an alien was an alien. The amending Act of 1933, passed to give effect to Chapter III of the Convention (signed at The Hague in 1930) regarding certain questions relating to the conflict of nationality laws, modified this principle, but only in so far as its application led to double nationality and statelessness. Eire, on the other hand, not only accepted the principle that marriage has no effect on a woman's nationality, but abolished the status of a British subject in so far as its law was concerned. New Zealand and Australia enacted legislation enabling a woman who married an alien to retain, within those countries, the political and other rights and privileges of British subjects. This mode of dealing with the matter did not, in form, interfere with the common code, but its practical effect was to create another discrepancy within the system.

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[1] For a general survey of this legislation see the writer's *British Nationality Law and Practice* (1947), Part II, chap. v.

In 1946 Canada (after notifying other Commonwealth countries of her intention in the matter) by enacting her Citizenship Act took a step which made it necessary to reconsider the whole scheme of the 'common code'. This Act was based on three main principles:

1. The definition of Canadian citizens;
2. The provision that all Canadian citizens are British subjects;
3. The provision that all persons who were British subjects under the law of any other Commonwealth country would be recognized by Canada as British subjects.

Thus the Act, whilst abandoning the common code, retained the common status. Following this Act a conference of legal experts representing the different Commonwealth countries met in London in 1947, and accepted, for general application throughout the Commonwealth, the principles adopted in the Canadian Act. The conference then proceeded to draft the scheme of fresh nationality legislation on the basis of those principles. Its recommendations were referred to, and accepted by, all the Commonwealth Governments.

Section 1 of the Act of 1948, which gives effect to these principles so far as the United Kingdom is concerned, reads:

> '(1) Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in sub-section (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British Subject.
>
> '(2) Any person having the status aforesaid may be known either as a British Subect or as a Commonwealth citizen; and accordingly in this Act and in any other enactment or instrument whatever, whether passed or made before or after the commencement of this Act, the expression "British Subject" and the expression "Commonwealth citizen" shall have the same meaning.'

The countries mentioned in sub-section (3) are the Commonwealth countries, namely, Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia, and Ceylon. Each of these countries forms a legislative unit for nationality purposes, and the United Kingdom and Colonies is also such a unit. Some time must elapse before all the countries concerned have legislated. At the time of writing,[1] in addition to the United Kingdom (which, of course, legislates for the Colonies in this matter) the following countries have enacted citizenship laws: Canada, Ceylon, New Zealand, and Australia. Newfoundland has become incorporated in Canada, and will not, therefore, enact a citizenship law; but Canada will in consequence amend her Citizenship Act. Eire, although she was a Commonwealth country at the time the Act of 1948 was passed, and was consulted regarding its provisions, has since ceased to be a Commonwealth country, but special rules were laid down in the Act in relation to Eire, which will be discussed below.

The scheme of this legislation is that each Commonwealth country will enact a citizenship law containing the principle enunciated in Section 1 (1) of the Act quoted above, by which mutual recognition as British subjects will be given to the citizens of other Commonwealth countries. When all these laws have been passed, British subjects, instead of being ascertained by reference to a common code, will simply be the sum-total of the citizens of all the Commonwealth countries. This fact is emphasized by the provision in Section 1 (2) that British subjects have the alternative title of 'Commonwealth citizens'.

The United Kingdom is responsible for many other territories besides the Colonies, and the national status of persons born in, or connected with, such territories is dealt with in the Act. First, there is the unique position of the Isle of Man and the Channel Islands, for which it was necessary to make special provision. These are part of His Majesty's dominions; they are not part of the United Kingdom, nor are they colonies, but persons born there have always been British subjects. The Act provides in Section 33 that for the purposes of the Act they are deemed to be colonies, and so fall within the citizenship law of the United Kingdom and Colonies. In view of the unique and historic connexion of these territories with the Crown, persons who derive their citizenship of the United Kingdom and Colonies from their connexion with these territories may, if they so desire, be known as citizens of 'the United Kingdom, Islands, and Colonies'. Secondly, there are people born or connected with protectorates, protected states, and trust territories, who have in the past been British-protected persons, but have not been dealt with by the ordinary nationality legislation. The new Act brings such people within its scope, leaving the details of their status to be defined by Order in Council.[1] It may be mentioned here, in passing, that most of the Indian states, which were formerly protected states, have ceased to be such by virtue of their union with India, and vast numbers of persons who were formerly British-protected persons have become Indian citizens; but at the time of writing the situation in this respect is too fluid to say more.

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[1] February 1949.

The effect of all the Commonwealth legislation when it is completed will be that for the purposes of British (or Commonwealth) nationality there will, in the United Kingdom and the other Commonwealth countries, in future be three classes of persons:

1. A citizen of the country;
2. Citizens of other Commonwealth countries (or of Eire);
3. Aliens.

No doubt some practical distinctions will be drawn between the first and second classes, but there will also be distinctions, rather more important, between the second class (British subjects generally) and aliens. The position of a British subject, whether or not he is a citizen of the United Kingdom and Colonies, is quite different in the United Kingdom from that of an alien. It is for the purposes of nationality law, and not of rights and privileges, that a distinction is drawn between citizens of the United Kingdom and Colonies and other classes of British subjects. Even for the purposes of nationality law the position of British subjects differs from that of aliens (e.g. acquisition of citizenship of the United Kingdom and Colonies). So far as the law of the United Kingdom is concerned a British subject, whether he is a citizen or not, still retains the right to vote, the right to enter the United Kingdom, and is eligible to enter the Foreign or Civil Service, whereas an alien enjoys none of these privileges.

Before passing to a more detailed account of the rules regarding citizenship contained in the British Nationality Act, 1948, it is necessary to say something about two immediate problems which confronted those concerned with framing the new legislation: (*a*) the position of Eire, and (*b*) what rules regarding nationality should be adopted, pending the completion of Commonwealth legislation?

The position of Eire citizens during the last twenty years or more has been anomalous and disputed. Provisions defining Eire citizens were enacted in the Constitution of the Irish Free State, 1922, and the Irish Nationality and Citizenship Act, 1935, as amended in 1937, defined Eire citizenship in detail. As a result of this legislation the status of a British subject did not exist under the law of Eire, and Eire citizenship was declared to be a citizenship for all purposes, municipal and international.[1] Under the law of the United Kingdom all persons born in Eire were British subjects. The contradiction between these views was brought into the limelight by the case of *Murray* v. *Parkes*, [1942] 2 K.B. 123. The matter is now settled for the future by the understandings reached at the London Conference of 1947 (where Eire was represented) which are embodied in Section 2 of the British Nationality Act. This enables Eire citizens who were, according to the law of the United Kingdom, British subjects immediately before the commencement of the Act, to give notice *at any time*[2] in writing to the Secretary of State claiming to remain a British subject on certain specified grounds. All the grounds presuppose, in one way or another, an association with the United Kingdom (e.g. by Crown service under the Government of the United Kingdom). On the other hand, Eire citizens (unlike the citizens of the Commonwealth countries) are not in future to be British subjects by reason of their Eire citizenship, nor does birth in Eire create the status of a British subject even for the purposes of the law of the United Kingdom. In spite of these facts Eire citizens are not aliens under the law of the United Kingdom (Section 32 (1) of the Act), but British subjects who do not also happen to be Eire citizens are aliens under the law of Eire.[3] It remains to add that the legal separation of Eire from the rest of the Commonwealth by the Republic of Ireland Act, 1948, has made no difference to the above provisions regarding nationality.[4]

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[1] The British Protectorates, Protected States, and Protected Persons Order in Council, 1949, discussed further below.

The second immediate problem was what rules should be adopted as regards nationality during the transitional period before all the Commonwealth countries have enacted citizenship laws. During this period there will be many persons who are not citizens of any Commonwealth country. It was decided that these persons should, during that period, be British subjects without citizenship. It should be noted that these transitional provisions, discussed in greater detail below, are based on a fundamental principle underlying the scheme, namely, that no one who possessed British nationality on 31 December 1948 should lose it, though he will not possess it in the same form as before. Citizenship becomes the gateway to the status of a British subject, but some people may have to wait until the gateway appropriate to them is open, and, until that time, they retain, 'without citizenship', the status of British subject which they possess under existing law. When all possible gateways are open, i.e. when all the Commonwealth countries have enacted citizenship laws, any who still remain homeless and unhoused will become citizens of the United Kingdom and Colonies.

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[1] Section 34, Irish Nationality and Citizenship Act, 1935.

[2] Italics are the writer's.

[3] The practical result of this is not very great because, by Executive Orders made under the Aliens Act, 1935, Eire exempts Commonwealth citizens from most of the restrictions attached to alienage.

[4] As a result of the corresponding legislation passed in 1949 by the United Kingdom, although Eire is not part of His Majesty's dominions she is nevertheless not a foreign country (according to the law of the United Kingdom) and is treated for many purposes as if she were still a Commonwealth country.

II

The provisions of the British Nationality Act, 1948, may be divided, for the purposes of discussion, under four Sections: A. Transitional provisions; B. Permanent provisions; C. Loss of citizenship; D. British-protected persons. It became necessary to determine who, out of the great mass of British subjects existing immediately before 1 January 1949, when the Act came into force, should become citizens of the United Kingdom and Colonies. At present, and for many years to come, the transitional provisions laying down the rules on this subject will be of the greatest practical importance. The permanent provisions deal with the acquisition of citizenship by persons who were not British subjects when the Act came into force. In order to apply the transitional provisions the pre-1949 law will, for a long time to come, still be important, for it will be necessary to refer to that law for the purpose of ascertaining whether or not a person was a British subject at the time the Act came into force.

Section A. *The transitional provisions*

These provisions, *which apply only to persons who were British subjects on 31 December 1948*, embody the following three principles:

(i) Those who possess a close connexion with the United Kingdom and Colonies (as defined by the Act) become citizens thereof;

(ii) Persons who have no particular connexion with any other Commonwealth country, such as qualifies them for potential citizenship of such a country, also become citizens of the United Kingdom and Colonies;

(iii) Persons who are potential citizens of another Commonwealth country become citizens of the United Kingdom and Colonies only if it is found, when all the Commonwealth countries have legislated, that they are not citizens anywhere.

It may be mentioned here that, notwithstanding the pre-1949 law, under which a woman who married an alien lost her British nationality (provided she acquired the nationality of her husband) such married women are deemed[1] for the purposes of the Act to have been British subjects on 31 December 1948, and consequently enjoy the benefit of the transitional provisions. In addition (and by way of exception to the rule

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[1] Section 14.

—followed in the Act—that a married woman's nationality is not affected by that of her husband) Section 12 (5) provides that a woman, who was a British subject when the Act came into force, but who, before the Act, married a person who becomes, or would but for his death have become, a citizen, shall herself become a citizen of the United Kingdom and Colonies.

(i) *Persons who possess a close connexion with the United Kingdom and Colonies*

The first principle (that of close connexion with the United Kingdom and Colonies) is more particularly defined by the following rules:

This 'close connexion' consists, under sub-sections (1) to (3) of Section 12 of the Act, of:

(*a*) birth in the *United Kingdom and Colonies* provided that the *de cujus* would have been a citizen if the new rules regarding citizenship by birth laid down in Section 4—which are discussed below as part of the permanent provisions—had been in force at the time of his birth, *or*

(*b*) naturalization in the *United Kingdom and Colonies*, *or*

(*c*) acquisition of the status of a British Subject by annexation of territory included in the *United Kingdom and Colonies* at the commencement of the Act, *or*

(*d*) being a person whose father was at the time of his birth a British Subject (wherever the *de cujus* was born) and whose father possessed any of the three above-mentioned qualifications, *or*

(*e*) birth within territory which was, at the commencement of the Act, included in a protectorate, protected State or United Kingdom trust territory.

It must be recalled that *in all these cases* the *de cujus* must have been a British subject on 31 December 1948.

Section 32 (1) defines 'a person naturalised in the United Kingdom and Colonies' so as to include (*a*) persons naturalized under the Acts of 1870 or 1914 by the Secretary of State or by the Governor of a Colony, (*b*) inclusion as a minor on a certificate of naturalization granted by the same authorities. It does *not* include naturalization in a Commonwealth country or 'local' naturalization. But Section 32 (6) converts 'local' naturalization into 'Imperial' naturalization for the purposes of the Act, so that the holder of a certificate of local naturalization is deemed to have become, immediately before the commencement of the Act, a British subject and a person naturalized in the United Kingdom and Colonies. This causes the transitional provisions to apply to him for the purpose of ascertaining his citizenship.

Sarawak and Cyprus are examples of territory included by annexation in the United Kingdom and Colonies. Formerly Southern Rhodesia was a case of this type, but, as Southern Rhodesia is another Commonwealth country, and was not therefore included in the United Kingdom and Colonies at the commencement of the Act, the provision about British subjects by annexation does not apply to it.

British subjects born in a protectorate, protected state, or United Kingdom trust territory were considered to have a closer connexion with the United Kingdom than with any other Commonwealth country. They become, therefore, under Section 12 (3), citizens of the United Kingdom and Colonies. At present trust territories include Tanganyika, the Cameroons, and Togoland.

(ii) *Persons who have no particular connexion with any other Commonwealth country*

Having defined the broad mass who automatically became, on 1 January 1949, citizens of the United Kingdom and Colonies, Section 12 embodies two other principles:

(*a*) All persons *other* than citizens of a Commonwealth country, or 'potential citizens' of it, as defined in Section 32 (7), or who were citizens of Eire, and *who were British subjects on 31 December 1948*, become citizens of the United Kingdom and Colonies.

(*b*) Persons who *were* such citizens or potential citizens on 31 December 1948 (and also British subjects) do not automatically become citizens of the United Kingdom and Colonies but remain, pending a final definition of their status, British subjects without citizenship.

In practice (*a*) covers an important class of persons being British subjects who, although not closely connected with the United Kingdom and Colonies within the meaning of sub-sections (1), (2), or (3), are nevertheless more closely connected with the United Kingdom than with any other Commonwealth country. These are British subjects born a second generation or more outside both the United Kingdom and Colonies and any Commonwealth country, e.g. in South America. Such persons in general look to the mother country—the United Kingdom—rather than to any Commonwealth country as the home of their patriotic associations. This general principle is stated in Section 12 (4), but sub-sections (5), (6), (7), and (8) deal with its application in particular cases. A woman who was a British subject on 31 December 1948, and was before that date married to a person who becomes, or would but for his death have become, a citizen, herself becomes a citizen (sub-section (5)). This provision is an exception to the general rule of the Act that a woman's nationality is independent of that of her husband. It is, however, in accordance with another principle of the new legislation, i.e. no one who possesses British nationality at the time of the passing of the Act should lose their status by reason of anything in the Act. A woman who became a British subject before 1 January 1949 by reason only of marriage would not become a citizen under the provisions of sub-sections (1), (2), and (3)—see discussion under head (i) above. Consequently the provision in sub-section (5) was necessary.

Sub-section (6) creates an exception to the rule that a person who is a citizen or potential citizen of a Commonwealth country does not, under the transitional provisions, acquire citizenship of the United Kingdom and Colonies. If the Secretary of State decides that, in a particular case, a person satisfying certain conditions prescribed by the sub-section has a close connexion with the United Kingdom and Colonies (notwithstanding his connexion with a Commonwealth country) he may allow that person, on application, to be registered as a citizen of the United Kingdom and Colonies (sub-section (6)). Sub-section (7) provides for arrangements enabling such applications to be dealt with in a Commonwealth country.

Persons who acquire citizenship under the transitional provisions by reason of their parentage (and not because they were born or naturalized in the United Kingdom and Colonies) and persons who, in spite of their citizenship of another Commonwealth country, elect for citizenship, under sub-section (6) above, cannot transmit their citizenship to their children, unless the conditions laid down by the permanent provisions for citizenship by descent (Section 5) are complied with. See, as to these conditions, Section B below.

(iii) *Persons who are citizens or potential citizens of a Commonwealth country*

Persons in this category do not automatically become citizens of the United Kingdom and Colonies. Those who were actually citizens of a Commonwealth country on 31 December 1948 have found their home in the scheme; their position is ascertained. They are, by virtue of Section 1 of the Act, British subjects and recognized as such. It is necessary, therefore, in order to apply Section 12 (4) to know the Commonwealth countries whose citizenship laws were in force on 1 January 1949. These were: Canada, New Zealand, and Ceylon (Australia not having a law in force on that date). Citizens of Eire are specifically excluded from becoming citizens of the United Kingdom and Colonies under the transitional provisions.

Potential citizens of another Commonwealth country do not automatically become citizens under Section 12. At the time the United Kingdom Act was being passed only one country—Canada—had already legislated for citizenship. A problem therefore arose in connexion with persons who were *potential* citizens under laws to be enacted by Commonwealth countries. The United Kingdom could not provide that they should be its citizens; on the other hand it would not be finally known whether or not they were citizens of some other country in the Commonwealth until all Commonwealth legislation had been enacted. If, however, when this has happened, a person who *was* a potential citizen proves *not* to be a citizen in fact, he becomes a citizen of the United Kingdom and Colonies.

A 'potential citizen' is defined in Section 32 (7). The following (if they are British subjects on 31 December 1948) are potential citizens of a Commonwealth country:

(*a*) Persons who were born in the country in question;
(*b*) Persons who acquired British nationality by naturalization granted by that country;
(*c*) British subjects by annexation of any territory of that country;
(*d*) British subjects by marriage to a person who, but for his death, would have been a potential citizen on 1 January 1949;
(*e*) Persons whose nearest ancestor in the male line who acquired British nationality otherwise than by descent acquire it by any of the means set out under the four previous heads.

It will be noticed that, for the purpose of determining potential citizenship, the acquisition of British nationality by marriage under the pre-1949 law is taken into account, as it is for the purpose of determining, under the transitional provisions, acquisition of citizenship of the United Kingdom and Colonies.

A woman who became a British subject by marriage to a person who *was* a citizen of a Commonwealth country on 1 January 1949 (and not merely a potential citizen) becomes a citizen of the United Kingdom and Colonies unless she is herself a citizen of the Commonwealth country in question.[1]

If, before all the Commonwealth countries have legislated, any potential citizen becomes a citizen of some Commonwealth country, or of Eire, or an alien, the transitional provisions have no further application in his case. If, however, none of these things happen he remains a British subject without citizenship (see below) until the last Commonwealth country has legislated. If he is still not a citizen anywhere on that date he becomes a citizen of the United Kingdom and Colonies.

British subjects without citizenship

As a transitional measure provision had to be made for persons who were British subjects on 1 January 1949, and who did not, on that day, become citizens anywhere (i.e. United Kingdom, Eire, or a Commonwealth country) but were potential citizens of a Commonwealth country. The position of such persons will not be finally ascertainable until the last of the Commonwealth countries has legislated, but in the meantime a status must be attributed to them until their position can be ascertained. Section 13 accordingly provides that such persons become British subjects without citizenship until the last of the Commonwealth countries has passed its citizenship law. When this has happened, and a British subject without citizenship has still not become a citizen anywhere, Section 13 (2) 'adopts' him as a citizen of the United Kingdom and Colonies.

Seeing that the whole conception of British subjects without citizenship is a transitional one, arising out of the fact that the independent action of no less than ten legislatures is involved, rules appropriate to such a conception are laid down in the Third Schedule. In general the law in force on 31 December 1948 (i.e. the old law) continues to apply to these persons, subject to four exceptions. These exceptions are as follows:

1. The rule that a British subject who marries an alien woman confers British nationality on her does not apply to any British subject without citizenship who marries during the period of his British nationality without citizenship.
2. The rule that the child of a British subject, born to him during the period he is a British subject, is also a British subject does not apply. Such a child will automatically acquire citizenship of the United Kingdom and Colonies if and when

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[1] This results from Section 12 (4) because she is neither a citizen nor a potential citizen of the Commonwealth country.

his father acquires it—unless the child has in the meantime become a citizen of a Commonwealth country or of Eire. The child is deemed to be a citizen by descent only.

3. The rule that a British subject who becomes naturalized in a foreign state thereby ceases to be a British subject does not apply.
4. The rule that a woman who, being a British subject, ceases to be one on her marriage to an alien does not apply.

A British subject without citizenship may apply at once for registration as a citizen under Section 6 of the Act, being treated for that purpose as a citizen of a Commonwealth country (see Third Schedule, paragraph 2).

For the purposes of applying the transitional provisions persons who were legitimated by the subsequent marriage of their parents are to be treated as possessing British nationality immediately before 1 January 1949 if they would have possessed it if born legitimate (Section 23). The normal rule is that 'child' means legitimate child (see Section 32 (2)).

In certain cases persons recover British nationality, so as to fall under the transitional provisions for the purposes of acquiring citizenship of the United Kingdom and Colonies. These cases are as follows:

1. A woman who married before the commencement of the Act, and on, or during, marriage ceased to be a British subject, is deemed, for the purposes of the Act, to have regained British nationality immediately before its commencement (Section 14).
2. A person who ceased to be a British subject by failure to make a declaration of retention at the age of 21 (under the Acts of 1922 and 1943) and would otherwise have been a British subject on 1 January 1949, is deemed to have been such. If a woman, who lost her British nationality by failure to make a declaration of retention of this kind, would have lost it in any event by her subsequent marriage, her marriage is disregarded (Section 15).
3. A minor child who lost British nationality under Section 12 of the Act of 1914 by reason of the action of his parents (in making a declaration of alienage, &c.) and would, apart from such action, have become a United Kingdom citizen or a British subject without citizenship, may recover it by making a declaration of retention in a prescribed form (Section 16).

In many of the above cases the persons concerned will have acquired a foreign nationality (e.g. married women) and will thus become dual nationals.

Section B. *The permanent provisions*

The Act provides for five modes of acquiring citizenship of the United Kingdom and Colonies, namely: (*a*) birth, (*b*) descent, (*c*) registration, (*d*) naturalization, (*e*) incorporation of territory into the United Kingdom and Colonies. With the exception of registration all these were represented in the old law. Citizenship by birth is the *jus soli* and corresponds in the old law to the status of a natural-born subject by virtue of birth within His Majesty's dominions and allegiance; British nationality could be acquired by descent provided certain rules regarding registration of the child's birth, &c., were followed. 'Incorporation of territory' covers annexation and cession; previously the acquisition of nationality by this means did not rest on specific statutory provision but on the common law. The principles governing naturalization are substantially the same, though British-protected persons are allowed certain privileges which aliens do not enjoy.

Registration is an entirely new and unique method of obtaining citizenship which does not exist outside the Commonwealth, and only applies in relation to citizens of Commonwealth countries. All that is required under the law of the United Kingdom is that the applicant should be a citizen of a Commonwealth country, or a citizen of Eire, of full age and capacity, who *either* (*a*) is ordinarily resident in the United Kingdom, and has been so resident throughout a period of twelve months (or a shorter period in special circumstances at the discretion of the Secretary of State) immediately preceding the application, or (*b*) is in Crown Service under His Majesty's Government in the United Kingdom. If these requirements are satisfied the applicant has the *right* to be registered as a citizen of the United Kingdom and Colonies. Registration is therefore essentially different from naturalization, which is always discretionary.

Although Section 19 allows for the voluntary renunciation of another Commonwealth citizenship, *registration* as a citizen does not involve the loss of any other Commonwealth citizenship. The possibility of dual citizenship within the Commonwealth was clearly contemplated and accepted.

(*a*) *Citizenship by birth*

Subject to certain exceptions every person, whether legitimate or illegitimate, born on or after 1 January 1949 in the United Kingdom and Colonies, whatever his parentage, is a citizen thereof by birth (Section 4).

The exceptions are:

(i) A person, whose father possesses at the time of that person's birth such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign, and whose father is not a citizen of the United Kingdom and Colonies. The persons entitled to such immunity are the following:

(*a*) Foreign Heads of States,

- (*b*) Foreign Ambassadors and other persons included in the Diplomatic List,
- (*c*) Persons entitled to immunities in virtue of their position as officials of an international organization pursuant to the Diplomatic Privileges (Extension) Acts, 1944 and 1946.

(ii) Persons whose fathers are enemy aliens and who are born in a place which at the time of their birth is under enemy occupation.

Special provision is made—for the first time—for persons born aboard ships and aircraft. Section 32 (5) provides that such persons, if born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the government of any country, shall be deemed to have been born in the place in which the ship or aircraft was registered, or, if it was not registered, in that country. The rare case of a birth on an unregistered merchant vessel or aircraft is not dealt with. The position in such a case will depend on where the vessel or aircraft is at the time of the birth. If it is in or over United Kingdom or Colonial territorial waters the child will be a citizen by birth; if on the high seas, or in a foreign port, he cannot be a citizen by birth but may be a citizen by descent according to the circumstances.

(*b*) *Citizenship by descent*

Citizenship by descent is acquired by a person whose father was at the time of that person's birth a citizen of the United Kingdom and Colonies (Section 5). Such a person, although he is a citizen by descent, may also be a citizen by birth, and in fact most citizens by birth will also be citizens by descent. If, however, the father of a citizen by descent is himself a citizen by descent only (and not by reason of birth in the United Kingdom and Colonies) the *de cujus* only acquires citizenship subject to certain conditions. The conditions comprise one of the following alternatives:

(i) The *de cujus or* his father was born in:
  - (*a*) a protectorate[1] *or*
  - (*b*) a protected state[1] *or*
  - (*c*) a mandated territory *or*
  - (*d*) a trust territory[2] *or*
  - (*e*) any place in a foreign country[3] where by treaty, capitulation, grant, usage or sufferance or other lawful means, His Majesty had at the time of the birth jurisdiction over British subjects.[4]

(ii) The *de cujus* was born in a place in a foreign country other than a place such as is mentioned in (i) (*e*) above, and the birth was registered at a *United Kingdom* Consulate within one year of its occurrence or, with the permission of the Secretary of State, later. The Secretary of State has power to give retrospective sanction to the registration of a birth registered out of time and without his permission.

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[1] Lists of protectorates and protected states are given in the British Protectorates, Protected States, and Protected Persons Order in Council, 1949.

[2] Not necessarily a *United Kingdom* trust territory: compare the qualifications for naturalization below.

[3] Meaning 'a country other than the United Kingdom, a colony, a country mentioned in sub-section (3) of Section One of this Act'— i.e. a Commonwealth country—'Eire, a protectorate, a protected State, a mandated territory and a trust territory'. Section 32 (1).

[4] For a list of such places see Appendix 11 of the writer's book, *British Nationality Law and Practice* (1947). At the present time Spanish Morocco, Muscat, and Oman are the only places still existing in which this provision might be held to apply for the future.

(iii) The father of the *de cujus* was at the time of the birth in Crown service under *His Majesty's Government in the United Kingdom*. This includes service under the Government of a Colony, protectorate, protected state, and United Kingdom trust or mandated territory.

(iv) The *de cujus* was born in Canada, Australia, New Zealand, the Union of South Africa, India, Newfoundland, Pakistan, Southern Rhodesia, or Ceylon, and a citizenship law had been enacted and taken effect there under which he did not become a citizen of that country at birth.

It will be noticed from a comparison of (ii) and (iv) above that a person born in a Commonwealth country, unlike a person born in a foreign country, does not require to have his birth registered in order to acquire United Kingdom citizenship, so that, if he is not at birth a citizen of the Commonwealth country in question, he acquires United Kingdom citizenship *by descent* automatically.

An important step is taken as regards citizenship by descent under (ii) above, the principle of which has been progressively extended since 1922. Between the fourteenth century and the 1914 Act British nationality could be transmitted by descent to the second generation born abroad but no farther. In 1914 such transmission was limited to the first generation born abroad. In 1922 the law was altered so as to allow British nationality to be transmitted from one generation to another indefinitely, provided certain conditions were observed, namely:

(i) the child's birth had to be registered within one year or, in certain circumstances, within two years;
(ii) the child himself, if he desired to retain British nationality, had to make a declaration of retention on attaining the age of 21;
(iii) if the child was the national of another state, he was required, at the time he made a declaration of retention, to renounce his foreign nationality.

By the British Nationality Act, 1943, the third condition was abolished, and the first condition was substantially modified by providing that, although the birth had normally to be registered within a year, it could be registered in special circumstances at any time with the permission of the Secretary of State. The second condition was also substantially modified by enabling the Secretary of State to accept in special circumstances a declaration of retention even after the age of 22.

In 1948 the condition as to making a declaration of retention was finally abandoned, and the position was reached that British nationality was transmissible by descent indefinitely, subject to the sole condition of the registration of the child's birth, provided, of course, the child's father was a citizen at the time of the birth. This gradual removal of restrictions on the *jus sanguinis* is an interesting feature of the legislation of 1922, 1943, and 1948.

In addition to abandoning the declaration of retention as a condition the Act provides, in Section 15, that persons who lost their British nationality by reason of their failure to make a declaration of retention are deemed, for the purposes of the Act, to be British subjects at the date of its commencement. Such persons therefore qualify to become citizens under the transitional provisions.

In applying the rules regarding citizenship by descent, where reference is made to a person's 'father' the *de cujus* must be legitimate. For the purposes of acquiring citizenship by descent (as opposed to citizenship by birth) legitimacy is all-important. An exception is, however, made in favour of persons legitimated by the subsequent marriage of their parents, who, by Section 23 of the Act, are to be treated, for the purposes of applying the citizenship rules, as legitimate as from the date of the marriage or of the commencement of the Act, whichever is later. A posthumous child is treated as though his father had survived his birth (Section 24).

(*c*) *Citizenship by registration*

This mode of acquiring citizenship does not correspond precisely to anything in the old law. Provided certain conditions are satisfied some persons are entitled as of right to be registered as citizens; others may be registered at the discretion of the Secretary of State. The persons entitled to be registered are:

(*a*) Citizens of a Commonwealth country or citizens of Eire, being of full age and capacity, who are *either* ordinarily resident in the United Kingdom, having been so resident throughout a period of twelve months immediately preceding the application, *or* who are in Crown service under His Majesty's Government in the United Kingdom. A British subject without citizenship is in the same position (see Third Schedule, paragraph 2).

(*b*) Women, British or alien, who have been married to citizens of the United Kingdom and Colonies. Such women need not be of full age and capacity, but, if they are aliens or British-protected persons, they must take the oath of allegiance.

The most important class of persons who may be registered at the discretion of the Secretary of State are the minor children of a citizen of the United Kingdom and Colonies, if the application is made by either parent or by a guardian of the child (Section 7). In special circumstances any minor may be registered whether his parents apply or not, and whether his father is a citizen or not.

It should be observed that although Eire citizens are not British subjects, they are treated, for the purpose of this important provision (and in most places in the Act) like Commonwealth citizens.

A person who has renounced or has been deprived of citizenship is not entitled *as of right* to be registered as a citizen. The Secretary of State may, however, in his discretion, allow such a person to be registered (Section 6 (3)).

(*d*) *Citizenship by naturalization*

The principles on which naturalization is granted are the same as those which prevailed in regard to naturalization as a British subject under the British Nationality and Status of Aliens Acts, 1914–43. In certain important points of detail there are differences:

(i) residence in a protectorate, United Kingdom trust territory, or in Anglo-Egyptian Sudan is now a qualification;
(ii) there is now no power to naturalize minors (though they may become citizens by registration);
(iii) service under the Government of Anglo-Egyptian Sudan, or service under an international organization of which His Majesty's Government in the United Kingdom is a member, are qualifications of service in addition to service under the Crown.
(iv) British-protected persons may be naturalized on special terms not applicable to aliens.

Of these the most important change is that relating to British-protected persons. These have in the past been treated for international purposes as British nationals, but under municipal law they have been treated as aliens. The Act, by reducing the period of residence required in their case, and by not specifying any particular length of service under the Crown, enables them to be naturalized on favourable terms as compared with aliens.

(*e*) *Citizenship by incorporation of territory*

If territory becomes part of the United Kingdom and Colonies in future (i.e. after 1 January 1949) an Order in Council may be made, specifying who are to become citizens of the United Kingdom and Colonies by reason of their connexion with the territory, and as from what date. This avoids many of the difficulties raised by the uncertainty of the old common-law doctrine regarding the effect on nationality of annexation and the acquisition of territory by cession.[1]

Section C. *Loss of citizenship*

Citizenship may be lost:

(*a*) By renunciation *or*
(*b*) By deprivation.

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[1] See the writer's book, op. cit., pp. 40 ff.

A citizen of full age and capacity (including a married woman who is no longer regarded in this matter as being under a disability) who is also a citizen of Eire or of some Commonwealth country, or the national of a foreign state, may make a declaration of renunciation which takes effect on registration. A citizen has a *right* to make such a declaration; the action of the Secretary of State is purely ministerial. In time of war, however, the Secretary of State may refuse to register the declaration.

A citizen of the United Kingdom and Colonies who is a citizen by registration,[1] or is a 'naturalized person' (including one naturalized under the old law as a British subject) may be deprived of his citizenship on the ground that the certificate of naturalization or the registration, as the case may be, was obtained by fraud, false representation, or concealment of a material fact. A naturalized person may be deprived of citizenship on grounds which are the same in principle as those applicable under the old law to naturalized British subjects.

The old law provided for the loss of British nationality in circumstances roughly corresponding to those outlined above, but in addition provided for loss in two other cases which do not apply under the new citizenship law, namely:

(*a*) naturalization in a foreign state;
(*b*) in the case of a woman, marriage.

Naturalization in a foreign state no longer causes loss of nationality (as it did under Section 13 of the Act of 1914). The old rule was based on two ideas: (1) double nationality should be avoided or minimized so far as possible by municipal legislation, (2) such naturalization showed a desire to shake off British allegiance and to identify the person applying for it with the state of his new nationality. As regards the first point, double nationality is not now considered specially undesirable, and, as regards the second point, many persons of unimpeachable British associations (as was proved in the two World Wars) became naturalized in foreign countries for purely business reasons, and it was no longer felt justifiable to cause them to lose their nationality automatically in such circumstances. The new Act, instead of making the acquisition of a foreign nationality (or of another Commonwealth citizenship) an automatic ground of loss, provides that in these circumstances the person concerned may, if he so desires, renounce his citizenship of the United Kingdom and Colonies. Section 19 (1), which enables this to be done, is of somewhat wider scope than the provisions in Section 14 of the Act of 1914, and avoids some of the difficulties of interpretation[2] which arose out of it.

The rules regarding deprivation of citizenship are similar to those adopted under the old law, but the following points of difference deserve notice:

1. Deprivation applies only to citizens by registration or naturalization,

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[1] This may arise under Sections 6–8 (the normal case) or under the transitional provision contained in Section 12 (6).

[2] Op. cit., pp. 202 ff.

or to persons who were also citizens of a Commonwealth country or of Eire, and have been deprived of that citizenship on grounds substantially similar to those specified in the law of the United Kingdom;

2. No mention is made of deprivation of the citizenship of the wife or minor children of the citizen, such as was made in Section 7A of the Act of 1914;
3. Absence over a prolonged period (being 'ordinarily resident' abroad for seven years continuously) in a foreign country is, as it was under the old law, a ground of deprivation, but this does not apply where the person concerned has either (*a*) been in the service of the Crown, or of an international organization of which one of His Majesty's Governments in any part of his dominions was a member, *or* (*b*) registered annually at a Consulate his intention to retain his citizenship of the United Kingdom.

An interesting question arises where territory is ceded by, or secedes from, the United Kingdom. According to the common law certain principles existed to determine whether or not inhabitants of the territory lost their British nationality.[1] Do these principles apply to loss of citizenship? The Act of 1948 contains no provision on the subject, and it is arguable that, as citizenship was unknown to the common law, these principles do not apply. It is believed, however, that the old principles would be applied by analogy, as citizenship is but another form of nationality; more correctly speaking it is a *United Kingdom* nationality.

Section D. *British-protected persons*

According to international law British-protected persons are regarded, and have been regarded for a long time past, as nationals of His Majesty. Their position has, however, to a great degree remained undefined (apart from the British Protected Persons Order in Council, 1934). Further, they have in the past, so far as English municipal law is concerned, been treated as aliens, and as subject to most of the disabilities of aliens. The new legislation makes two important changes: (1) it enables these persons to be defined, and they have been defined, by Order in Council; (2) it distinguishes them from aliens.

The British Protectorates, Protected States, and Protected Persons Order in Council, 1949, adopts similar rules for the determination of the status of a British-protected person to those laid down in the British Protected Persons Order in Council, 1934. A person born in a scheduled protectorate, protected state, or United Kingdom trust territory is a British-protected person. He is also a British-protected person if born outside the territory before the Order came into force, if his father was born in the territory. If he is born outside the territory after the coming into force of the Order he is a British-protected person, provided that his father was born in the territory, and was a British-protected person at the time of the birth of the person concerned. Provision is made for the registration as protected persons of women who have been married to British-protected persons. The Order applies to the New Hebrides and Canton Island but at present the connexion with the New Hebrides required to make a person a British-protected person has not been defined.

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[1] Op. cit., p. 53.

The Order does not deal with protected persons who are such by virtue of their connexion with a Commonwealth territory; such persons remain aliens under the law of the United Kingdom. The legislation of Commonwealth countries will deal with their own protected persons (as, for example, New Zealand has done).

British-protected persons are distinguished from aliens in the following respects:

(*a*) they are eligible for naturalization on terms more favourable than those applicable to aliens (Second Schedule, paragraph 3);

(*b*) they are not subject to the disabilities imposed on aliens by the Aliens Restriction Acts, 1914 and 1919, or Orders made under them;

(*c*) for the purposes of the nationality law[1] they are not aliens: see the definition of 'alien' in Section 32 (1).

Statutory recognition is given to British-protected persons for the first time by Section 32 (1) of the Act, which provides:

> ' "British-protected person" means a person who is a member of a class of persons declared by Order in Council made in relation to any protectorate, protected State, mandated territory or trust territory to be, for the purposes of this Act, British protected persons by reason of their connexion with that protectorate, State or territory.'

The 1949 Order in Council mentioned above has been made under this provision. It contains a Schedule of protectorates and protected states, and adopts as the test of a protected person similar rules to those laid down in the 1934 Order. A person is British-protected if he was born in a protectorate or a trust territory. If he was born elsewhere, and was born before the Order came into force, he is a British-protected person, provided his father was born in a protectorate or trust territory. If, however, he was born elsewhere after the Order came into force he is only a British-protected person if his father was such.

III

The British Nationality Act, 1948, which introduces an entirely novel conception into British nationality law and, in many respects, into the nationality laws of the world, cannot be fully worked into the general scheme until all the Commonwealth countries have legislated. The transitional provisions will in any event continue to be most important for many years to come, as it is only in the light of them that the position of millions of British subjects now living can be ascertained. As their status is to be determined by reference to the question whether or not they were British subjects at the date of the commencement of the Act, reference must still be made for this purpose to the pre-1949 British nationality law.

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[1] But see Second Schedule, Part II, of the British Nationality Act, 1948, from which it appears that the Status of Aliens Act, 1914 (Sections 17 and 18), still applies to them.

In future the conception and definition of a British subject is purely statutory. To be a British subject is to be a citizen of some member-state of the British Commonwealth of Nations, as the alternative title 'Commonwealth citizen' clearly shows. The title 'British subject' is the common denomination of citizens of the Commonwealth, but the tie between the individual and a particular member-state is not defined thereby; it is necessary to ascertain his citizenship before he can be identified for the purposes of protection and for international purposes generally. It will be possible for the Commonwealth countries to stipulate in their treaties for benefits for their citizens, and to espouse the claims of such citizens before international tribunals.

The main principles on which the citizenship law of the United Kingdom is based are not dissimilar to those adopted in the nationality legislation which was common to all countries of the Commonwealth for so many years. The *jus soli* and the *jus sanguinis* are represented, as before, though under the unfamiliar titles of 'citizenship by birth' and 'citizenship by descent'. The innovation introduced in 1922, which made it possible to transmit British nationality to generation after generation born on foreign soil provided the birth is registered, is continued, and is even extended, or rather the former restrictions on the *jus sanguinis* are abandoned. The conditions for naturalization remain in principle as they were under the old law except that, for the first time, more favourable conditions are granted to British-protected persons than to aliens.

Important changes take place regarding the position of minors, British-protected persons, and married women, the rules regarding loss of nationality have been changed in certain respects, and the law regarding the effect of acquisition of territory by the Crown is clarified. Although these points have been dealt with in detail above it may be useful to summarize briefly the effect of the changes made.

Minors cannot now be naturalized, and the action of their parents cannot cause them to lose their citizenship. They can, however, be registered as citizens on application by their parents or guardians if the father is a citizen, or, in special circumstances, in such cases as the Secretary of State thinks fit. In all cases the powers of the Secretary of State are discretionary.

British-protected persons are expressly declared not to be aliens for nationality purposes, and their status is enhanced by their inclusion in the general scheme of the new legislation.

Another radical change takes place regarding the position of married women, whose national status has for years been the subject of controversy. The old law provided that an alien woman who married a British subject acquired British nationality; a British female subject marrying an alien lost her British nationality unless she did not, by reason of her marriage, acquire the nationality of her husband. All this is changed, and any rules consequential upon these doctrines become obsolete, except in so far as it is necessary to apply the pre-1949 law, e.g. for the purposes of the transitional provisions. The Act of 1948 is silent regarding any distinction, in so far as concerns the acquisition or loss of citizenship, between a man and a married woman. The Act speaks throughout, in connexion with citizenship, of 'any person', which includes a woman, whether married or not. Inasmuch as citizenship was unknown to the common law, the old common-law rules about the effect of marriage on nationality do not revive, and the effect of the Act of 1948 is simply that a married woman, so far as citizenship is concerned, is in the same position as a man.

The rules regarding loss of citizenship differ from the old rules in some important points. Naturalization in a foreign state does not now have any effect on the nationality of the person concerned. Voluntary renunciation of citizenship is somewhat wider in scope than a declaration of alienage under the old law, and the rules regarding deprivation are modified on certain points.

The old law referred in general terms to British subjects who became such by annexation of territory. This left many cases in which fresh territory was acquired by the Crown untouched by statute; e.g. territory acquired by treaty of cession. Such cases were dealt with by the common law, which was not entirely clear. The new provisions refer in general to all cases where territory becomes incorporated in the United Kingdom and Colonies.

There is one further point which deserves special notice. The word 'allegiance', which for many centuries has figured as part of the definition of a British subject, disappears. The common-law rules regarding nationality were built around the doctrine of allegiance; yet the conception of allegiance was a difficult one to apply when considering the rules of nationality law. The principal object of using the word 'allegiance' in the 1914 Act (apart from the tradition behind the word) was to exclude from British nationality persons born within His Majesty's dominions who were the children of foreign heads of states, ambassadors, &c. The same result is now achieved by specifying these particular exceptions to the *jus soli*. The terms of the oath of allegiance to be taken by naturalized persons remain unaltered, and it is still as important as ever that the oath be taken, because until then the certificate of naturalization does not take effect. Although there is not now a distinction between natural-born British subjects and naturalized subjects (the legislation in which this distinction was drawn having been repealed by Section 31), all British subjects continue to owe allegiance to His Majesty, who continues to be king in all his dominions. The position may therefore be summed up as follows:

Allegiance is not now a *source* of British nationality (which rests upon the statutory definitions of citizenship in the Commonwealth legislation) but it continues, inevitably, to be a *consequence* of it. There is no longer a common code of nationality law, but there is a common status and a common allegiance owed by all Commonwealth citizens or British subjects to the one Crown.

CONCLUSIVENESS OF THE STATEMENTS OF THE EXECUTIVE

CONTINENTAL AND LATIN-AMERICAN PRACTICE

By A. B. LYONS, M.A., LL.B.

Two earlier articles[1] in this *Year Book* have reviewed the practice in England and the United States of America, respectively, whereby the Executive certifies to the courts regarding certain matters of an international law nature. In the present article[2] an attempt will be made to ascertain the relevant practice in some principal countries outside what is termed the Anglo-American legal system. In such countries the principle of separation of powers, almost universally recognized, results in a specific assertion of the independence of the courts from the Executive in the carrying out of their judicial duties. The effect is that it is procedural law—frequently emanating from the judiciary itself—that decides, first, whether application should be made to the Executive for information, or whether reliance should be placed on other sources of evidence, on general principles of law, or even on the study of relevant foreign legislation. Secondly, it is in general the same law of procedure which decides whether the information supplied by the Executive shall be regarded as conclusive and binding on the court.

Diplomatic envoys and the diplomatic list. From time to time the envoy hands a list of the members of his retinue to the Foreign Minister of the receiving state.[3] With this list in his possession the Minister for Foreign Affairs can, when approached by a court, certify whether or not the person the subject of the inquiry, usually the defendant, has diplomatic status. Replying to a questionnaire on Diplomatic Immunity issued by the League of Nations Committee of Experts on the Progressive Codification of International Law,[4] European governments expressed different views on the subject. There was a general tendency not to treat the list as being in any way conclusive. Thus, the German Government said:[1]

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[1] Lyons, 'The Conclusiveness of the Foreign Office Certificate', in this *Year Book*, 23 (1946), pp. 240–81, and 'The Conclusiveness of the "Suggestion" and Certificate of the American State Department', ibid. 24 (1947), pp. 116–47.

[2] I am indebted for assistance in writing this article to the Embassies and Legations in London of Czechoslovakia, Greece, Italy, The Netherlands, Norway, and Switzerland; to the British Embassies and Legations in Copenhagen, Rome, and Berne respectively; and to the Institut Hellénique de Droit International et Étranger and the Société Suisse de Droit International. I have also received valuable guidance from Professor Paul Guggenheim of Geneva, Professor L. Gyselinck of Antwerp, Professor Gordon Ireland of Cambridge, Mass., U.S.A., Professor Charles Rousseau of Paris, and Professor W. de Steiger of Berne. In addition, I must express my deep gratitude to Professor J. H. W. Verzijl, of the University of Utrecht, for his active interest in the preparation of the article and the trouble he has taken repeatedly in providing me with material.

[3] See Oppenheim, *International Law* (7th ed., 1948), vol. i, § 401; Satow, *A Guide to Diplomatic Practice* (3rd ed., 1932), p. 167. And see 'Draft Convention on Diplomatic Privileges and Immunities', in *A.J.*, Supplement, 26 (1932), p. 21.

[4] League of Nations C. 196, M. 70, 1927 V.

> 'For practical purposes it is open to doubt whether to avoid all abuses and uncertainty the enjoyment of privileges can be subject to the condition that the persons' names must figure in a list transmitted to the Minister of Foreign Affairs of the receiving State . . . for special reasons, the receiving State may raise objections to the staff lists transmitted to it, and even refuse them.'[2]

Most legal systems do not, however, make immunity depend on the staff list. For example, in Switzerland it appears that a diplomatic person is clothed with immunity as soon as he crosses the frontier into Swiss territory. But this begs the question whether a person is one of those entitled to be so clothed with immunity. The Swiss reply[3] to the League of Nations' questionnaire was:

> 'In practice . . . [lists of staff] . . . are drawn up by the Ministry of Foreign Affairs on the basis of particulars officially supplied by the diplomatic missions.[4] The inclusion of a person in these lists would not seem to imply any legal consequences; it is simply a formality denoting that the position claimed for the person concerned is recognised. . .'

and, indeed, the reply continues:

> 'in practice a Minister is allowed diplomatic privilege and immunity immediately on his arrival at the frontier.'

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[1] League of Nations C. 196, M. 70, 1927 V, p. 134.

[2] Not only did Germany reject the 'staff list' system, but it would appear that the German courts need not consider themselves bound by a certificate of the Minister as to diplomatic status. See, for instance, the *Diplomatic Immunities* (*German Foreign Office*) case, decided by the Oberlandesgericht of Darmstadt on 20 December 1926, where it was held that the 'declaration of the Foreign Office on a question of exterritoriality does not formally bind the courts. In fact, the Foreign Office itself had expressed the opinion that a declaration made by it is not binding on a German court' (*Juristische Wochenschrift*, vol. lvi (1927), p. 2324; *Zeitschrift für Internationales Recht*, vol. xxxix (1928), p. 284; *Zeitschrift für Völkerrecht*, vol. xiv (1928), p. 594; *Annual Digest of Public International Law Cases*, 1925–6, Case No. 244, and Note). See also a case decided by the Reichswirtschaftsgericht in 1928: *Jur. Wochenschrift*, 1929, p. 970, cited by Mann in *Transactions of the Grotius Society*, 29 (1944), p. 165, n. 35: 'both courts took the view that the Secretary of an Ambassador whose appointment is not confirmed or is objected to by Germany is not entitled to immunity'. Professor Lauterpacht (*The Function of Law in the International Community* (1933), p. 389) mentions that in Germany there is no rule that the courts are bound by the statements of government departments. And see Duez, *Les Actes de gouvernement* (1935), p. 124.

[3] *Ubi supra*, at p. 247.

[4] It is not clear whether similar lists were required from heads of delegations to the League of Nations at Geneva. In *V.* v. *D.*, decided by the Tribunal of First Instance of Geneva on 10 June 1926, affiliation proceedings were brought against one of the permanent delegates of Yugoslavia to the League. The defendant claimed diplomatic immunity under the Swiss Law of 21 August 1922, giving exterritoriality to permanent delegates, and the Court was content to rely on certificates given by the Yugoslav Foreign Office. The Ministère public (see p. 193, *infra*) intervened and submitted that the Court had no jurisdiction. In its judgment, which was confined to the plea to the jurisdiction, the Court said: 'The Ministère public contends that D., by the documents which he has produced, and in particular by the certificate of the Minister of Foreign Affairs of the Kingdom of the Serbs, Croats and Slovenes . . . has established satisfactorily his status as permanent delegate of the Serbian Government to the League of Nations. This certificate shews, inter alia, that D.'s functions commenced on 15 June 1925. . . . Hence at the time of the summons, D. clearly had the status of a permanent delegate.' The Court therefore had no jurisdiction. See *Clunet*, 54 (1926), p. 1175, with notes by Noël-Henry at pp. 983 and 1179; Scott and Jaeger, *Cases on International Law* (1927), p. 446; *Annual Digest*, 1925–6, Case No. 247.

When a claim for such immunity is raised *in foro*, the court adjudicating is bound by the general rules of evidence and procedure, there being no express provision in the codes[1] which deal with such cases. The absence of such express provision also leaves the courts at liberty to have regard to evidence other than that supplied by the Executive. In practice, however, the courts will regard a communication from the Protocol department of the Foreign Office, which deals with both status and immunity, as conclusive evidence.

The French case of *Drtilek* v. *Barbier*[2] is illuminating as to the practice in France. D. was the Chancellor of the Czechoslovak Legation in Paris but his name had not been communicated to the French Minister of Foreign Affairs for inclusion in the special list of persons claiming diplomatic immunity. According to the judgment of the Court:

> 'il résulte d'une attestation du ministère des Affaires Étrangères que Drtilek ne figure pas sur la liste officielle du corps diplomatique, et qu'il ne saurait à aucun titre se prévaloir des immunités diplomatiques.'

The passage cited is not unambiguous. Did the 'attestation' confine itself to stating that D.'s name was not on the diplomatic list, leaving the court to deduce that he was not entitled to immunity, or did the Ministry itself give the ruling? That the former may be the case is suggested by the note to the report in *Clunet*:

> 'En pratique, les agents diplomatiques, etc., font connaître au ministre des affaires étrangères le nom de leurs collaborateurs. Le ministre est donc qualifié pour attester ou dénier le caractère diplomatique auquel peut prétendre tel ou tel étranger.'

Here, it is submitted, 'caractère' connotes the status of the claimant.[3]

Diplomatic envoys—ad hoc certification. Whether or not the 'staff list' or diplomatic list exists in a given state, it appears to be common practice in any case of a disputed claim for immunity that the courts apply to the Executive for information either as to status or as to both the status and the rights of the claimant. A review of cases from some of the countries of Europe will illustrate this.[1]

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[1] In Switzerland, civil procedure is a cantonal matter, so that some twenty-four legislatures are involved. However, it is thought that in practice all the courts proceed along the same lines, as laid down by the Swiss Foreign Office and Department of Justice.

[2] Court of Appeal of Paris, 14 December 1925; *Clunet*, 53 (1926), p. 638; *Annual Digest*, 1925–6, Case No. 242. The Court also held that even if D.'s name had appeared on the official list he had waived immunity from jurisdiction by his conduct of the action. See Note in *Annual Digest, ad loc.*

[3] With regard to Italy, see Brookfield, 'Immunity of the Subordinate Personnel of a Diplomatic Legation', in this *Year Book*, 19 (1938), at p. 159. He quotes from the judgment in *Cimino Bosco* v. *Escheveri*, *Rivista di Diritto internazionale*, 23 (1931), p. 563; *Annual Digest*, 1929–30, Case No. 196: 'The old theory of the exterritoriality of diplomatic agents has been abandoned and replaced by another more correct doctrine. . . . Not only the families but also the diplomatic agents themselves are subject to the territorial laws and to the jurisdiction of our courts in regard to all questions of private law concerning their persons, except where the agents have acted as representatives, or at the order, of the foreign state.' He concludes from this that inclusion in the diplomatic list is of little or no consequence in Italy, since the courts will always assume jurisdiction to decide whether the suit concerns a private act or not, and, if it does, will give judgment notwithstanding the diplomatic status of the defendant. See also *Perucchetti* v. *Puigy Cassauro*, *Riv. Dir. Int.*, 20 (1928), p. 521, and *In re Serventi*, *infra*, p. 190. In any event, '. . . in Italy, the rule does not obtain that courts are in these matters bound by the statement of the governmental department' (Lauterpacht, op. cit., p. 389).

In 1922, Kahn, the Persian Minister in Austria, bought a house there. He ceased to be Minister in 1926, and died in 1930. His heirs appealed against the assessment of a tax on his house. A statement of the Department for Foreign Affairs was read in court, according to which Kahn 'by reason of international comity' had enjoyed the privilege of exterritoriality until 1926. After that he had to be regarded as a private individual and his house no longer exempt from taxation.[2] Again, in what is known as the *Legation Building* (*Execution by Hypothecation*) case,[3] a motion for the attachment of a legation building in Vienna, the Court of Appeal referred to a declaration received from the Minister of Justice to the effect that a legation building is inviolable in accordance with the usage of the law of nations, and that the proposed attachment appeared inadmissible under international law. The plaintiff appealed to the Supreme Court, contending that the Minister of Justice was not competent to make a binding declaration on this question. In any event, the declaration was erroneous, seeing that the legation building as such was not immune from judicial execution. The Court rejected the plaintiff's arguments. In order to decide whether a declaration should have been obtained from the Minister of Justice as to the admissibility of a judicial execution on a legation building, it was first of all essential to establish ownership. The fate of the building depended on the status of the owner. As execution on the property of a sovereign state was a questionable matter, the views of the Minister of Justice had been properly applied for, and his opinion was legally binding on the Court. Hence the motion for attachment must fail.

The practice in Czechoslovakia is for the Ministry of Justice to certify by a declaration to the Court whether and to what extent any person enjoys exterritorial rights.[4] The Court is required, in case of doubt, to submit a report to the Ministry and to apply for such a declaration. The Ministry makes its own inquiries, and usually issues its declaration in conjunction with the Ministry of Foreign Affairs. The Court is bound by the declaration and cannot inquire further. The declaration is categorical, and that it should be in conflict with known facts is not, apparently, to be contemplated.

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[1] As to Germany, see p. 181, n. 2, *supra*.

[2] *In re Kahn*: *Sammlung der Erkenntnisse des Verwaltungsgerichtshofes*, 1932, *Finanzrechtlicher Teil*, p. 509; *Annual Digest*, 1931–2, Case No. 182.

[3] Oberster Gerichtshof (Supreme Court in Civil Matters), 15 March 1921: 6 *Entscheidung des Obersten Gerichtshofes in Zivil-Sachen*, p. 69; Hudson, *Cases and other Materials on International Law* (2nd ed., 1936), p. 807; Allen, *The Position of Foreign States before National Courts* (1933), p. 271; *A.J.* 23 (1929), pp. 592–3, and see *A.J.*, Supplement, 26 (1932), p. 702; *Annual Digest*, 1919–22, Case No. 208.

[4] Art. IX of the Introductory Law to the Statute concerning the Exercise of Jurisdiction of 1 August 1895 (No. 110 in the Imperial Code); §§ 81–3 and 85 of the Statute (No. 111 in the Imperial Code); Civil Procedure Code, 1911, Art. 1, § 41, No. 2 (*d*); *Bulletin of the Ministry of Justice*, Nos. 38 of 1924 and 70 of 1931.

In an action[1] in 1924, the Supreme Court of Czechoslovakia had occasion to make inquiry of the Foreign Ministry on the question, not whether certain persons had diplomatic status, but whether such status carried the right to represent the sending state. The Plenipotentiary Representative of the U.S.S.R. in Prague claimed to represent the Russian state in an appeal from a Court Order appointing a curator of certain immovable property in Prague belonging to the Russian state; the Court of Appeal inquired whether he was entitled so to act. The Ministry of Foreign Affairs sent the Court a letter emanating from the Czechoslovak Minister in Moscow, stating that he was informed by the Russian Commissariat for Foreign Affairs that representatives of the U.S.S.R. abroad were entitled to act for the Russian state before foreign courts in matters of private law. On reading this, the Court of Appeal held that the appeal was duly lodged. On further appeal, however, this was reversed by the Supreme Court, who held that the Plenipotentiary Representative was not entitled to act for Russia. It had made its own inquiry of the Foreign Ministry, who, in a communication to the Court, expressed the opinion that, as regards matters of private law, diplomatic missions and their heads were not entitled, merely on the strength of their official mission, to act for their state before the courts of the receiving state. The question of who could so act was one for the courts to decide by their own municipal law. Hence, the Supreme Court held, the communication from the Russian Commissariat for Foreign Affairs could not bind Czechoslovak courts if found to be in contradiction with Czech law.

A somewhat similar case[2] occurred in 1929. On an application for an order for the sale of certain property belonging to the Hungarian Legation, the Court, being doubtful whether execution should issue, applied for a declaration by the Minister of Justice. The latter, in concert with the Minister of Foreign Affairs, gave a decision that such an execution was, according to international law, not permissible.[3] The Court therefore refused to make the order, and its decision was confirmed by the Court of Appeal. On further appeal, the Supreme Court upheld the decision, but pointed out that there had been no need to apply for the declaration. It was necessary only in doubtful cases. In the present instance, according to international law, there was no doubt as to the impropriety of the execution.[1]

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[1] *Soviet Representation in Czechoslovakia* case, Supreme Court of Justice, 6 May 1924, 19 May 1925: Vážný: *Collection of the Decisions of the Czechoslovak Supreme Court of Justice in Civil Matters*, 3808 and 5043; *Annual Digest*, 1925–6, Case No. 44.

[2] *The Immunity of Legation Buildings* case, Supreme Court of Justice, 28 December 1929: Vážný 4491, Civ.; *Annual Digest*, 1927–8, Case No. 251 (see also Case No. 111 and the relevant Czechoslovak legislation set out at p. 370).

[3] Distraint against an 'exterritorial person' or in exterritorial premises can be levied only in so far as international law permits: Law of 1881, Art. IX, § 33, as amended by Law of 19 January 1928 (No. 23 in Official Collection of Laws and Ordinances of the Czechoslovak Republic), and Statutory Rules of Procedure in Distraint, No. 79, 27 May 1896, § 31, sec. 1.

In Belgium, it is understood, when a question arises concerning the diplomatic status of a person, the parties themselves consult the list of those who are entitled to diplomatic status, kept at the Ministry of Foreign Affairs. They apparently accept entry, or absence of entry, on this list as conclusive, and no decisions of the courts have been found on the subject.

There is no lack of French case reports on matters of international law, thanks to collections such as *Clunet*[2] and *Sirey*[3] and to many writers who have examined carefully and at length the relations between court and Executive,[4] but one is left with the impression that application to the Foreign Office is not by any means invariable. It can be no more than an impression, however, since none of the writers appear to deal directly with the point, and the reports often seem reluctant to disclose whether the evidence on which the court decided emanated from the Foreign Office or from some act of the parties. Thus, in an early case, *Guy Brothers* v. *Bazili and Partners*,[5] the judgment runs: 'Attendu le caractère diplomatique d'A . . . dont il a justifié . . .' without indicating how the justification was effected.

In the comparatively recent case of *Salm* v. *Frazier*,[6] there is the same ambiguity as to evidence, and all we are told is that 'it appears from the documents in the case that Frazier was accredited by the U.S.A. as Commissioner for Austria', leaving us to guess whether the documents emanated from the French, the American, or the Austrian Foreign Office; or were possibly some sort of identity papers carried by Frazier himself. It is known that the French law of evidence, in common with that of other continental legal systems, is much less bound by strict rules than the English, and that fact must be borne in mind when considering reports of French cases. It does not, however, facilitate a just assessment of the motives which led the Court to its decision.

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[1] The Provisional Treaties of 1922 had left open the question of recognition *de facto* of the Governments of both the U.S.S.R. and Czechoslovakia; and provided that 'rights of juridical persons' were granted to the Russian Government so far as commercial activities were concerned. The Court pointed out that this was a strictly limited field of action and, therefore, it could not recognize the Plenipotentiary Representative of the U.S.S.R. as representing the Russian state in matters of private law.

[2] *Journal du droit international*, annual volumes from 1874 onwards.

[3] *Recueil général des lois et arrêts*, annual volumes from 1794 onwards.

[4] Notably Challine, *Le Droit international public dans la jurisprudence française de 1789 à 1848* (1934); Duez, *Les Actes de gouvernement* (1935); Despagnet, *Cours de Droit international public* (1910); Niboyet, 'Les Immunités de juridiction, en droit français, des états étrangers engagés dans les transactions privées', *Revue Générale*, 43 (1936), p. 525.

[5] Court of Paris, 5 April 1813; Dalloz, *Répertoire*, V (1846), p. 397, cited by Challine, op. cit., p. 203.

[6] Court of Rouen, 12 July 1933: *A.J.* 28 (1934), p. 382.

Sometimes, however, it is clear that the Court has ignored the diplomatic list and other facilities offered by the Foreign Ministry, and where some other government department has made an administrative decision as to a person's diplomatic status, the Court has accepted that decision as binding and conclusive. That is what happened in *Dientz* v. *La Jara.*[1] The defendant was military attaché to the Peruvian Legation. He claimed diplomatic immunity, and stated that the French Government had exempted him from taxation—from the *contribution personnelle et mobilière.* The Court held that, by so doing, the Government had recognized that La Jara was entitled to some immunity. La Jara was not a consular agent, the Court argued, therefore it must have been diplomatic immunity to which he was entitled.

There are cases, on the other hand, in which it is expressly stated that the Minister of Foreign Affairs has either intervened or been approached on a question relating to the diplomatic status of a defendant. Thus, in *Gaspin* v. *de Broc,*[2] where the defendant claimed that a summons should have been served on him through the diplomatic channel, and not at his legation, the Ministry of Foreign Affairs informed the court that de Broc had never claimed diplomatic privilege, and that he had himself previously asked to be tried by a civil tribunal. The Court held that this amounted to a waiver of diplomatic immunity.

The Ministry again, this time in concert with the police authorities, supplied useful information to the same Court in *Christidis* v. *Verissi and Wife.*[3] Christidis was at one time a second secretary of legation, performing the function of Greek Consul. He raised the question of the competence of the Court, relying on both his positions as second secretary and Chargé de Consulat. The police authorities, however, testified that he had told them that he was now Greek Vice-Consul, having ceased to be second secretary; and the Ministry informed the Court that on 2 August 1898, before the action was commenced, Christidis had been notified that he had been appointed Greek Consul in a town in the Balkans, adding that he had the following day handed over his post at the Legation to his successor. The Court held that the communication from the Ministry showed that since 3 August 1898, Christidis had ceased to have any immunity.[4]

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[1] Tribunal Civil de la Seine, 31 July 1878: *Clunet,* 5 (1878), p. 500.

[2] Tribunal Civil de la Seine, 28 January 1885: *Clunet,* 12 (1885), p. 426. Cited by Sir Cecil Hurst (in *Hague Recueil des Cours,* 12 (1926), p. 119), who states (at p. 191) that 'there is no precise rule as to how immunity of a diplomatic agent should be claimed'.

[3] Tribunal Civil de la Seine, 18 February 1899: *Clunet,* 26 (1899), p. 369.

[4] Cf. *Re de Gravenhoff,* decided by the same Court on 27 April 1918. The accused having

A formal communication as to diplomatic status from the Ministry is mentioned in *Demoiselle B.* v. *D.*[1] Miss B. sued D. for non-payment of rent. D. pleaded diplomatic immunity, and produced a letter from the French Minister of Foreign Affairs to the Procureur-Général (Attorney-General) of the Court of Appeal of Paris, stating that since 1922 D. had been employed as Chancellor in a foreign legation in Paris. On reading this letter, the Court held that it was conclusive:

> 'La qualité d'agent diplomatique ne saurait donc être contestée au défendeur, et qu'il est fondé prévaloir de l'immunité qui couvre les agents diplomatiques.'

According to the Greek Code of Civil Procedure, a person who claims diplomatic immunity must himself obtain a certificate from the Ministry of Foreign Affairs. (In criminal cases the court itself applies to the Ministry.) The Certificate deals only with questions of status, that is to say, it establishes that the person has been accredited to Greece, or that he is charged with diplomatic functions. In civil cases this reply is binding on the court, which, by Article 26 of the Code of Civil Procedure, has no jurisdiction over persons who enjoy diplomatic status or exterritoriality. It has been held that even where the Executive has accepted a person as diplomatic representative of another country which is not a state from the point of view of international law (because it does not, for example, occupy a definite territory, or is not fully independent), the courts are bound to grant immunity. Otherwise, they would be intermeddling with matters of state (*actes du pouvoir exécutif*) contrary to Article 808 of the Code of Civil Procedure.

In criminal cases, however, the Greek courts appear to be able to disregard the certificate of the Ministry of Foreign Affairs in just such circumstances. For example, in one case[2] the claimant purported to be the diplomatic agent of a virtually unrecognized state, Armenia, set up by Articles 88–93 of the Treaty of Sèvres, 1920, which had not been ratified. The Chargé d'Affaires of the Armenian Legation at Athens and his secretary were charged with attempted murder. Both produced Certificates from the Greek Ministry of Foreign Affairs stating that they had diplomatic status. The Court nevertheless held that it had jurisdiction. The Certificates

returned after expulsion from France, was charged with a breach of the expulsion order. He alleged that he represented the Russian Ministry of Commerce. It transpired, however, that when he had his passport visaed by the French Ambassador at Petrograd he had omitted to mention the expulsion order. The French Ministry of Foreign Affairs was consulted, and gave the opinion that the visa had been wrongly issued. The Court thereupon held that the accused's re-entry into France was improper (*Clunet*, 45 (1918), p. 1183).

[1] Tribunal Civil de la Seine, 20 June 1927: *Clunet*, 55 (1928), p. 637; *Annual Digest*, 1927–8, Case No. 247. It is tempting to speculate whether the parties here are the same as in *Drtilek* v. *Barbier* (see p. 182, *supra*). There are several similarities as to the facts, but differences as to the law applied. The question of waiver of diplomatic privilege was raised in both cases.

[2] *Re Armenian Chargé d'affaires*, Court of First Instance of Athens, No. 263 of 1924: *Thémis*, vol. 35, p. 188; *Annual Digest*, 1923–4, Case No. 172.

were not decisive, seeing that 'diplomatic immunities were provided in international law, and not in executive decrees'. Only the judiciary had the right to ascertain whether there existed the conditions required for diplomatic status. The accused could not invoke such status as representatives of a state set up by a treaty which had not been ratified.

What may be called a negative certificate of the Foreign Ministry—denying diplomatic status—was, however, accepted by the Greek courts in another case.[1] The Consul-General of Paraguay was prosecuted, and pleaded immunity on the ground that owing to the mission with which he was entrusted, he enjoyed diplomatic status. The prosecution produced to the Court a Certificate from the Ministry of Foreign Affairs showing that the Greek Government had not recognized that he had been 'charged with functions having a diplomatic character'. The Court held that it had jurisdiction. Conceding that a Consul invested with diplomatic functions enjoyed immunity from jurisdiction, it was not enough that the sending state should entrust such functions to him; if the receiving state does not recognize his diplomatic character, he is not entitled to immunity.

The Dutch reports provide an interesting instance[2] of direct intervention in a court of law by the Executive at the request of a foreign power. Divorce proceedings were commenced against a person described in the summons as a clerk at the Belgian Legation at The Hague. The respondent did not appear, but the Belgian Minister in a communication to the Dutch Minister of Foreign Affairs claimed immunity for him, describing him as an attaché to the Belgian Legation. By order of the Minister of Justice, the Public Prosecutor moved the Court to renounce jurisdiction, which it accordingly did. Apart from this, it is believed, special instance, the courts follow the maxim of Netherlands law that what is generally known needs no proof.[3] Under Section 58 of the Constitution, the conduct of foreign affairs is part of the Royal Prerogative and is exercised by the Crown on the advice of the Minister of Foreign Affairs. The recognition of foreign diplomatic representatives is essentially a matter for such exercise of the prerogative.

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[1] *In re Consul General of Paraguay*, Areopagus (No. 85 of 1929): *Thémis*, vol. 40, p. 480; *Annual Digest*, 1929–30, Case No. 215.

[2] *In re Mrs. J.*, District Court of The Hague, 21 November 1933; *Weekblad van Het Recht*, 1933, No. 12607; *Nederlandsche Jurisprudentie*, 1943, p. 163; *Annual Digest*, 1933–4, Case No. 165 (the Note to which states that it is reported 'because of the peculiarities of the procedure by which diplomatic immunity was raised').

[3] Cf. *Herani Ltd.* v. *Wladikawkaz Railway Co.*, decided by the District Court of Amsterdam on 11 June 1940; on appeal, by the Court of Appeal of Amsterdam, 4 November 1940. This was a debenture holders' action against the Railway Company. They based their claim on the invalidity of Russian decrees nationalizing the Company's property. Dismissing the action, the Court said: 'It is common knowledge that in 1918, the Russian Government nationalised all private railway companies of Russian nationality'; and the Court of Appeal dismissing an appeal, said: 'The regulations enacted by the Government of the U.S.S.R. . . . as is well known, entail the annihilation of private railway companies.' See *Nederlandsche Jurisprudentie* (1946), No. 496; *Annual Digest*, 1919–42, Case No. 10.

If, then, a court is in doubt whether in a case before it diplomatic immunity has been rightly claimed, it may ask the Minister of Foreign Affairs how the prerogative is exercised. The Minister will, usually by letter, inform the court whether or not the name of the person claiming immunity is on the list of diplomatic agents. If so, the communication is binding on the court, seeing that it is not for the judiciary to question the exercise of the prerogative. But if the reply is that the name is not on the list, then the court is free to consider any evidence which it may think fit.[1]

The Norwegian courts require a statement from the Ministry of Foreign Affairs in support of a claim for diplomatic immunity. This statement can be obtained by the parties themselves, or, in default, will be sought by the court itself. The reply is generally in the form of a letter from the Ministry to the party concerned or to the court, and it will deal with either status or immunity, according to what is asked for.[2]

An Italian case relating to the status of a member of the Russian Trade Delegation, received in Italy, as in other countries, before the recognition by the receiving state of Soviet Russia, may usefully be considered here. Serventi, an Italian, assaulted and threatened M. Worovsky, head of the Russian Commercial Mission accredited to the Italian Government. He was prosecuted under Article 130 of the Criminal Code, which relates to crimes committed against representatives of foreign states accredited to the Italian Government. On the question whether the Mission and its head were representatives of a foreign state, a communication from the Ministry of Foreign Affairs was put in evidence. It stated that the Russian Delegation had come to Italy as the result of a treaty with the Italian Government, and that it had an official character. It did not expressly declare whether M. Worovsky had been granted the status of a diplomatic agent. The Court held that he did not have such status, and therefore Article 130 did not apply. The Court supplied the deficiencies in the ministerial communication by, first, drawing on general principles of international law, and, secondly, a deduction from other governmental acts similar to that made by the French Court in *Dientz* v. *La Jara*.[3] A state, said the Court, acquires the right of being represented by diplomatic agents accredited to other states only when it is recognized by those other states. Russia was not yet recognized by Italy, had not yet an international legal personality, nor had it been accorded the right of legation. Hence, Worovsky had not the status of a representative of a foreign state. Further, the Court accepted evidence that the baggage of Worovsky and other members of the Mission had been subject to customs examination at the railway station at Rome, which confirmed that he had no diplomatic status.[1]

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[1] Similar considerations apply to claims for sovereign immunity.

[2] In *Miller and Rosen, Representing the Provisional North Russian Government* v. *A. Glassenap*, the Supreme Court of Norway affirmed a decision of the Byrett (Town Court) of Oslo of 30 June 1923, rejecting documents produced by the plaintiffs and emanating from other sources, namely, a declaration signed by the President of the Council of Russian Ambassadors, stating that Miller was entitled to act on behalf of the Provisional Government, and another, from the Norwegian Legation in Paris, as to the status of the said Council (*Norsk Retstidende*, 1926, pp. 779–81; *Annual Digest*, 1925–6, Case No. 45).

[3] *Supra*, p. 186.

Consuls. 'Consuls', according to Oppenheim,[2] 'do not enjoy the position of diplomatic envoys', yet by treaties regulating their position they are often specifically exempt from civil and criminal proceedings. In France treaties regularly promulgated in the *Journal officiel* have the force of law,[3] and the courts will only exceptionally take upon themselves the task of interpreting a treaty.[4] Although the Court will not normally apply to the Executive for assistance in cases involving Consuls, it will do so where the interpretation of a treaty is in question.

This rule is borne out by two notable cases. In the first,[5] King, United States consular agent in France, was charged with deceit (*escroquerie*). He successfully pleaded immunity, and the Ministère Public appealed. The Convention of 23 February 1853 between France and the United States, promulgated by Decree dated 11 September 1853, provided (Art. 2) that:

> 'Consuls General, Consuls, Vice-consuls and consular agents, both of France and the United States shall enjoy in both countries privileges generally accorded to their offices, such as personal immunity, except in case of crime (*hormis le cas de crime*).'

The Court quoted from the Instruction Général of 8 August 1814 on the rights and duties of Consuls, issued by the Ministry of Foreign Affairs, and concluded that King was immune from the jurisdiction of the criminal court. The Ministère Public appealed further, to the Court of Cassation, which applied to the Ministry for an official interpretation of the terms of the treaty. The scope and interpretation of treaties being a matter for the governments by whom they were concluded, the Court held that:

> 'When the solution of a question depends on the interpretation of a diplomatic convention, the court seised of the matter must either conform to the official interpretation, if and as soon as the Government has given it in the case, or suspend its decision if such interpretation is not produced. The official interpretation of the provisions of the treaty, especially the term "personal immunity", having been requested

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[1] *In re Serventi*, Court of Appeal of Rome, 20 May 1921: *Monitore dei Tribunali*, 1922, p. 31; *Clunet*, 49 (1922), p. 189; *Annual Digest*, 1919–22, Case No. 211. As to exemption of baggage of envoys, see Oppenheim, op. cit., vol. i, § 394.

[2] *International Law*, vol. i, § 434; and see Beckett, 'Consular Immunities', in this *Year Book*, 21 (1944), p. 34.

[3] See, for example, *Administration des finances tunisiennes* v. *Zanna Haï*, decided by the Court of Cassation, 28 February 1930; 1931 *Sirey*, Part I, p. 193.

[4] See Note in *Annual Digest*, 1929–30, pp. 359–63, and *infra*, p. 199.

[5] *Ministère Public* v. *King*, Tribunal Correctionnel de la Seine, 3 July 1911: *Clunet*, 40 (1913), p. 185; Court of Appeal of Paris, 14 December 1911: ibid., p. 182; Court of Cassation, 23 February 1912: ibid., p. 207; Hudson, op. cit., p. 893.

> of the Government for production at the trial, the department of Foreign Affairs had stated in letters dated 25 November and 4 December 1911 (and referred to in a previous communication of 21 June 1909), that the two powers were in complete accord on the question of principle . . . [and] that the result of their bilateral interpretation was that the clause regarding personal immunity of consular agents should not extend to immunity from territorial jurisdiction in criminal matters (*matière répressive*) but only to exemption from preventive arrest and detention.'

As a result of these communications, the Procureur-Général requested the Court, 'on whom this interpretation was binding (*à qui cette interprétation s'imposait*)', to recognize that the criminal court had jurisdiction, and the Court of Cassation accordingly reversed the judgment of the courts below.

In the second case,[1] the first was quoted as a binding precedent, but application was again made to the Executive for an interpretation. The case was an action for libel and defamation of character against Bigelow, the director of the passport section at the American Consulate at Paris.[2] He pleaded 'personal immunity' under the Convention of 1853. The Court of first instance held that it had jurisdiction, citing *King*'s case (*supra*), and that 'the question of personal immunity enjoyed by consuls, is by the vagueness of that expression, essentially one for governmental interpretation'. This ruling was confirmed by the Court of Appeal of Paris, citing a letter from the Minister of Foreign Affairs, dated 26 October 1926, and produced in the course of the present case. According to this letter, the clause relating to personal immunity 'provides for immunity not from jurisdiction but from arrest and imprisonment', and the Court concluded that 'this view the Courts must accept by virtue of the principle of separation of powers'. The decision was upheld, on further appeal, by the Court of Cassation.

An early instance in which a French Court, faced with a claim for consular immunity, did not apply for verification to the Ministry of Foreign Affairs, even in case of real doubt, occurred in *Re Maglione and Preve*,[3] a prosecution of two men who claimed immunity on the ground that they were on the staff of (*attachés au*) the Sardinian Consul-General at Marseilles. The Court held:

> 'Even though Maglione and Preve, according to the documents produced in court (*par les pièces dont ils se prévalent*) might be representatives of the Sardinian Consulate

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[1] *Princess Zizianoff* v. *Kahn and Bigelow*, Tribunal Correctionnel de la Seine, 5 April 1927: *Clunet*, 55 (1928), p. 142; *Gazette du Palais*, 1927, vol. ii, p. 18; Court of Appeal of Paris, 28 January 1928: *Gaz. du Palais*, 1928, vol. i, p. 727; Court of Cassation, 15 December 1928: *Gaz. du Palais*, 1929, vol. i, p. 194; *Dalloz Hebdomadaire*, 1929, p. 69; *Annual Digest*, 1927–8, Case No. 266.

[2] Kahn was the Paris representative of the American paper in which the alleged libel appeared. No question of his immunity arose.

[3] Court of Aix, 14 August 1829: Dalloz, *Répertoire*, vol. v (1851), p. 279. Cited by Challine, op. cit., p. 210.

at Marseilles, they are nevertheless under the jurisdiction of the Magistrate's Court of that town.'

The decision does at least show that the Court drew a distinction between proving, in whatsoever manner, the status of a claimant to immunity and assessing the immunity which that status carried.

In a more recent case, *De Fallois* v. *Piatakoff and Others*,[1] it was not until the case reached the Court of Cassation, the Court of final resort, that such application was made. Piatakoff and his co-defendants were the former head and assistant managers of the Commercial Agency of the U.S.S.R. in France. The Franco-Soviet agreement of 11 January 1934 provided that the head of the Russian Trade Delegation and his assistants should form part of the Soviet Embassy in France and should enjoy diplomatic immunity. The courts below had held that the defendants were entitled to such immunity. The plaintiff appealed, and a communication (*dépêche*) from the Ministry of Foreign Affairs stated that the defendants had held the respective offices mentioned, adding 'but it appears to be clear that they had ceased to exercise their functions before 11 January 1943'. The judgment of the Court of Appeal was therefore overruled.

Cases involving the person of the sovereign. There appear to have been comparatively few cases of this nature before the courts of European countries. For the most part, the party to the action is the state itself, or an emanation or 'instrumentality' of the state. When a sovereign in person, however, is sued, he may find that the forum does not recognize sovereign immunity. In Italy, for example, where even the King himself is subject to ordinary law in respect of his 'private' obligations, the courts will not grant any special privilege to foreign sovereigns. Thus in *Nobili* v. *Emperor Charles I of Austria*,[2] the plaintiff had started legal proceedings arising out of a private transaction, against the Archduke Charles Francis Joseph. During the hearing, the defendant became Emperor of Austria, and claimed that he was thenceforth entitled to immunity from the jurisdiction of the Court. The contention was rejected on the ground that the Emperor's obligations arose out of private law contracts entered into in Italy. In Hungary, however, the rule is otherwise, and is similar to that of the English courts,[3] and it would appear that when there is doubt as to the status of a person who alleges that he is sovereign, the question of his immunity is referred to the Executive. Thus, when the Prince of Lippe-

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[1] Court of Cassation, 26 February 1937: *Gaz. du Palais*, 13 April 1937; *Nouvelle revue de Droit international privé*, 1937, pp. 324–7; *Rev. critique de Droit international*, 1937, pp. 700–4; *Sirey*, 1938, Part I, p. 117; *Recueil général*, 1937, Part 3, p. 80; *Clunet*, 64 (1937), p. 750; *Annual Digest*, 1935–7, Case No. 84.

[2] Court of Cassation of Rome, 11 March 1921: *Giurisprudenza Italiana*, vol. i (1922), pp. 1, 472.

[3] Cf. *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149.

Schaumberg's lawyer sued his royal client for his fees, the Supreme Court of Hungary held that it had no jurisdiction. The status of the Prince as a person enjoying exterritoriality was 'definitely settled' by the declaration of the Minister of Justice to that effect.[1]

Part-sovereign states. When in an action the question arises whether a state is fully sovereign or not, an English or American court is apt to refer the question to its own Government.[2] Continental courts seem to prefer to seek evidence and assistance from elsewhere.[3] This is well illustrated by actions against constituent states of certain of the federal Republics of South America. Thus in *Feldman* v. *State of Bahia*[4] the Brussels Court of Appeal reviewed the history of the Republic of Brazil from the proclamation of the Federal Republic in 1889, and its Constitution. It came to the conclusion that although the states of Brazil, including Bahia, call themselves sovereign, from the point of view of international law sovereignty belongs only to Brazil, i.e. to the ensemble of all the states. Hence Bahia was not sovereign and had not sovereign immunity, so that a contract made between the plaintiff and the state of Bahia was within the jurisdiction of the Court.

In *Crédit foncier d'Algérie et de Tunisie* v. *Restrepo and Department of Antioquia*,[5] the Tribunal Civil de la Seine had the assistance of the *Substitut* of the Ministère Public,[6] and heard from him the history of the Republic of Colombia and its Constitutions. From these it was deduced that Antioquia was a mere department, had no external sovereignty, and was not entitled to claim the immunity due to a sovereign state.

But the Court itself examined the Constitution of Brazil in *Dorr* v. *State of Céara*,[7] when that state, sued in respect of a loan, raised the defence that

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[1] *X.* v. *Prince Lippe-Schaumberg*, No. 12772: *Döntvénytár Magyar Kir Curia Semmitőszéki és Legfőbb Itélőszéki Osztályának elvi jelentősegü Határozatai*, vol. xiv (1876), i, p. 25, No. 73, cited by Allen, op cit., p. 276.

[2] See this *Year Book*, 23 (1946), p. 265; ibid., 24 (1947), p. 133.

[3] Or to dispense with evidence and rely on a wide judicial knowledge. Thus in *Somigli* v. *State of San Paulo*, decided by the Tribunal of Florence in 1906, the Court held that it was notorious (*è di notorietà*) that the state had no special representation in Italy and that the Brazilian Minister in Rome represented the Confederation of that country as a political entity (*Rivista di diritto internazionale*, 2 (1907), pp. 379–80, cited in *A.J.*, Supplement, 26 (1932), at p. 486).

[4] *Pasicrisie Belge*, vol. ii (1908), p. 55, cited in *A.J.*, Supplement, 26 (1932), p. 484.

[5] 11 December 1922: *Clunet*, 50 (1923), p. 857; *Gaz. du Palais*, 1923, vol. i, p. 439; *Annual Digest*, 1919–22, Case No. 201. Restrepo was the Secretary of the Colombian Legation and was sued as 'representative of the Department of Antioquia at Paris'. He claimed diplomatic immunity, but as representative of Colombia not of the Government of Antioquia. The *Substitut*, in his argument before the Court, admitted Restrepo's diplomatic status, adding: 'Je puis vous en apporter la justification officielle', but contended that he would enjoy diplomatic immunity only if he were sued in his private capacity, not, as here, when sued in an official capacity, the real defendant being the Government of a (non-sovereign) state.

[6] 'Magistrature établie près de chaque tribunal, requérant l'exécution des lois au nom de la société' (Larousse).

[7] 27 June 1928: *Clunet*, 56 (1929), p. 1042; *Annual Digest*, 1927–8, Case No. 21 (sub nom. *State of Céara* v. *Dorr*).

French courts were not competent to hear an action brought against a foreign state. The Court of first instance had rejected the defence, on the ground that Céara was one state of the United States of Brazil and, seeing that under the Brazilian Constitution of 1891 it did not have the attributes of sovereignty, it was not entitled to immunity from jurisdiction. The judgment was upheld on appeal, when the Court considered the terms of Article 48 of the Constitution, which gave the President of the Republic the sole powers of declaring war, making peace, negotiating treaties, &c., and concluded that the attributes of sovereignty lay in the Republic, not in the state, which could therefore not enjoy the immunity claimed for it.

The status of the constituent states of the Swiss Federal Republic was considered by the French courts at the end of the last century, in the protracted litigation[1] concerning the succession to the estates of the Duke of Brunswick, who died in Geneva in 1873, litigation which was marked not only by an intensive study of the Swiss Constitution, but also by an appeal to the court to have in mind the question of good relations between France and Switzerland. This type of argument is not unknown in American courts,[2] but instances are rarely found in reports of French cases.[3] The subject of foreign relations is one which the courts in France deem to be reserved strictly to the Executive.[4] In *Ville de Genève* v. *Consorts de Civry*,[5] the City of Geneva pleaded to the jurisdiction of the French courts. In support of the plea, there was quoted an extract from a report presented in 1892 by the Federal Council to the Federal Assembly, to the effect that the present action 'notionally brought against the City of Geneva' is really aimed at the Canton of Geneva which is a sovereign state. Hence, it was argued, the French courts had no jurisdiction, and it was hoped that those courts would accept this and so avoid 'an international conflict which would not harmonise with the excellent relations between Switzerland and France'. The claimants relied, first, on Article 1 of the Federal Constitution, to show that Geneva had not sovereignty, which lay in the Confederation; secondly, on a circular from the Federal Council 'to all states, including Geneva'; and, thirdly, on Article 102 of the Constitution of the Republic of Geneva of 1849, which calls Geneva a 'commune'. The Court accepted these, and found that the City of Geneva could not claim immunity. Only the Confederation could do that.

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[1] Lasting from 1891 until 1896 (see *Clunet*, 24 (1897), p. 137; *Sirey*, 1896, vol. i, p. 225).

[2] See, for example, *Sullivan* v. *State of São Paulo* (1941) 36 F. Supp. 503; 122 F. (2d) 255; *Annual Digest*, 1941–2, Case No. 58, at p. 190; this *Year Book*, 24 (1947), p. 133.

[3] See, however, *In re Société Française Radio-Électrique et Compagnie Générale de T.S.F.*, decided by the Conseil d'État on 10 January 1930: *Clunet*, 58 (1931), p. 1103; *Annual Digest*, 1929–30, Case No. 233.

[4] See Duez, op. cit., p. 52, citing Gros, *Survivance de la raison d'état*, p. 132: 'L'action diplomatique ne comportera aucun recours contentieux.'

[5] Court of Appeal of Paris, 19 June 1894: *Clunet*, 21 (1894), pp. 1032, 1052.

Reference to external sources. In view of the wide scope which continental courts have in their choice of evidence, it is not perhaps surprising to find them referring to sources outside their own state boundaries. Declarations of foreign offices of other countries, judgments of foreign courts, even statements of foreign officials, have all been accepted at their face value and deemed sufficient to base judicial decisions. A notable instance occurred when, in 1942, the Czechoslovak Military Court of Appeal in London had to interpret the British Allied Forces Act, 1940.[1] The Court set itself to study the 'meaning of retrospective operation as it is understood in British [*sic*] Law', and, after quoting from standard English legal text-books and leading cases, came to a conclusion which was

> 'further supported by the note which the British Foreign Office sent to the Czechoslovak Foreign Office and of the contents of which this court has been informed by a letter of the Czechoslovak Ministry of Defence . . . [to the effect that] . . . the British Government has intimated that it does not agree that the members of the Czechoslovak Army should be proceeded against by Czechoslovak military courts in British territory for offences committed before [a certain date]'.

The Court added: 'There must be attached great weight to the interpretation given to a British statute by the British Government.'[2]

A court sitting in a foreign country, seeking to interpret legislation of that country, not only has facilities for consulting works of foreign jurists, but also is in a specially favourable position for obtaining a ruling from the Government of its temporary domicil. A case in which a French court, without these conditions being present, had regard to a declaration by the Executive of another Government than its own was *Lahalle and Levard* v. *The American Battle Monuments Commission*.[3] The defendant Commission claimed that it had no personality apart from that of the American state, and was therefore immune from the jurisdiction of the French courts. The Court of Appeal of Paris said:

> 'We consider that the greatest attention must be paid to the declaration of the government of the United States of America which affirms that the American Battle Monuments Commission is a State organisation. General Pershing, President of the Commission, may have said that it was a body independent of the Government. However, he made it clear at the same time that it was directly responsible to the Parliament of the United States of America.'

A German court went further, and undertook a study of legislation of a foreign country in the case of *The Ice King*,[4] a ship described as belonging to the United States of America, which collided with a German vessel. In the subsequent action for damages, the defendant pleaded to the jurisdiction. The Court of first instance rejected the plea, a judgment which was reversed on appeal. On final appeal on a point of law, it was held that the German courts had no jurisdiction. In arriving at that conclusion the Court cited section 7 of the United States Act of 9 March 1920, 'authorising suits against the United States in admiralty', by which the authorities of the United States are expressly instructed to claim jurisdictional immunity abroad for United States ships. Section 9 of that Act[1] appeared to be in conflict with section 7, but the Court took it upon itself to construe the Statute and came to the conclusion that, reading it as a whole, the section could not be read as implying a waiver of immunity.[2]

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[1] 3 & 4 Geo. VI, ch. 51.

[2] 15 July 1942: *Decisions of Czechoslovak Military Courts*, vol. i (1941–2), No. 4; *Annual Digest*, 1941–2, Case No. 31, sub nom. *Allied Forces* (*Czechoslovakia*) case.

[3] 28 February 1936: *Revue critique de Droit international*, 32 (1937), p. 484, with a note by Professor Niboyet; *Annual Digest*, 1935–7, Case No. 88.

[4] *Reichsgericht in Civil Matters*, 10 December 1921: *Entscheidungen des Reichsgerichts in Zivilsachen*, vol. clxiii, p. 275; *Annual Digest*, 1919–22, Case No. 102.

Another instance of courts stepping outside their national boundaries, as it were, occurs when the principle of reciprocity is invoked.[3] Thus, when an action[4] was brought in Poland against the German Treasury and the City of Berlin, the Court referred to the Ministry of Justice for information as to the position of foreign states implicated in actions before German courts. The letter from the Ministry intimated that such states were completely immune from the jurisdiction of German courts, and set out the provisions of the German Civil Code[5] and German Constitution[6] governing proceedings in this regard. The action was dismissed.

Act of state and the courts. Inquiring further into the relation between Judiciary and Executive in matters other than those involving diplomatic and sovereign immunity, we find ourselves in the province of act of state, *acte de gouvernement*. Particularly is this so in regard to situations affected by international law. 'L'action diplomatique constitue le domaine de prédilection de l'acte de gouvernement. C'est là que ce dernier s'est enraciné avec le plus de vigueur. On a pu dire que le ministère des affaires étrangères était le paradis des actes de gouvernement.'[1] The act of state here envisaged comprises, it need hardly be said, not so much the kind of executive action abroad free from control by the courts which is met with in cases like *Johnstone* v. *Pedlar*,[2] as decisions of high policy taken by governments and their ministers. Not only are such decisions free from judicial control: according to the strength of the judiciary, and the strength of its tradition of separateness, it is to a greater or lesser extent governed by the Executive, and made its instrument in putting into effect those decisions. Normally, the judiciary is the servant—if it serves anyone—of the legislature. The courts administer justice according to law—according to the laws made by Parliament. To the extent that they follow the behests of a government department expressed otherwise than through acts of Parliament, they might be said to depart from their fundamental rule, save that the Foreign Office is a department whose activities are peculiarly uncircumscribed by acts of the legislature, and whose will may therefore properly be, and often must be, expressed without reference to such acts. When such is the case, the courts must have regard to the will of the Foreign Office; more, they must often seek to inquire what its will is.[3] There may be no other way in which justice can be done, seeing that justice rests on certainty.

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[1] 41 Stat. 1525, cap. 95. Section 9 provides that 'such vessels, while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels'.

[2] In the *Diplomatic Immunities* (*German Foreign Office*) case (see p. 181, *supra*) the German Court said of its opinion that it 'seems also to be in accordance with the practice of British courts. (See the judgment of the English Court of Appeal of 1 June, 1891)', apparently referring to *In re Cloete* (1891), 65 *Times Law Reports*, p. 102.

[3] Reciprocity is, for example, required by the French landlord and tenant law of 30 June 1926 (see *Lanco* v. *Singer Co.*, decided by the Court of Rennes on 16 June 1930: *Clunet*, 57 (1930), p. 149; *Annual Digest*, 1929–30, Case No. 153; and *Clot* v. *Schpoliansky*, decided by the Civil Tribunal of the Seine, 4 November 1930: *Clunet*, 58 (1931), p. 1111; *Annual Digest*, 1929–30, Case No. 218) and by Art. 11 of the *Code Civil*, as to security for costs (see *Lloyds Bank* v. *De Ricqlès and De Gaillard*, decided by the Commercial Tribunal of the Seine, 4 November 1930: *Clunet*, 58 (1931), p. 1018; *Sirey*, 1931, Part II, p. 47; *Annual Digest*, 1929–30, Case No. 405). In none of these cases, however, does the court disclose how it ascertained what reciprocity was given to French subjects abroad.

[4] *German Immunities in Poland* case, Supreme Court of Poland, 31 August 1937: *Clunet*, 66 (1939), p. 767; *Orzecznictwo Sadów Polskich*, vol. xvii, No. 306; *Annual Digest*, 1935–7, Case No. 95.

[5] Paras. 31, 89, and 839.

[6] Art. 131.

Recognition of foreign states and governments. The recognition of foreign communities as states is a typical example of a decision of the Executive made through its Foreign Office. In general, European courts rely on information given by the Foreign Office in these matters, but the binding nature of such communications may, as will be seen, vary according to whether the recognition is *de jure* or *de facto*.

In Belgium, questions of recognition arising out of the Spanish Civil War of 1936–9 were commonly decided without reference to the Foreign Office, but in general such matters are political questions, which the Ministry of Foreign Affairs is alone competent to solve. The Ministry takes the view that the courts have no jurisdiction in the matter. In Belgian civil courts a representative of the Crown, the Ministère Public, is always present. If a political question arises, he will ask guidance, through the Procureur-Général, of the Minister of Justice who refers to the Minister of Foreign Affairs.[4] The courts themselves are very reluctant to touch upon political questions, and they readily declare themselves incompetent even in cases of doubt. In Czechoslovakia, the rule that the Ministry of Justice issues a declaration, binding on the courts, as to the existence and extent of rights of exterritoriality, extends also to juristic persons, in particular foreign states,[1] and this rule is invoked in those cases where the question of the recognition of a foreign state or government by the Czechoslovak Government is doubtful. In Greece, on the other hand, the courts are free to come to their own decisions on questions of recognition of foreign states and governments, and are not bound to apply to the Executive for information or guidance.

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[1] Duez, op. cit., p. 52.

[2] [1921] 2 A.C. 262.

[3] 'Some continental courts are bound by their local law to follow the views of the Executive departments after asking their opinion on the matter . . . in Belgium, France, Great Britain, the Netherlands and Sweden, the ordinary practice is for the question of state immunity to be raised by the Public Minister or some other representative of the Department of Justice or Foreign Affairs, and there is some tendency to follow such recommendations without judicial enquiry' (*A.J.*, Supplement, 26 (1932), p. 687).

[4] In commercial courts, where there is no Ministère Public, the Referendary applies to the Minister of Justice or the Procureur du Roi for the necessary information.

The Norwegian courts generally require a declaration from the Norwegian Government as regards the recognition of a foreign community or government. In a case[2] involving the question which of the rival Governments in Spain during the Civil War was recognized, the Court referred first to two judgments of the English courts.[3] Then it quoted a communiqué of the Norwegian Foreign Ministry Press Bureau dated 5 October 1938, stating:

> 'Since the administration of General Franco now comprehends the greater part of Spanish territory, the Norwegian Government has entered into an arrangement with him whereunder each of the parties will nominate an agent entrusted with the protection of the interests of his compatriots in the territory of the other . . .'

and concluding with a statement to the effect that this arrangement implies recognition neither *de jure* nor yet *de facto*.[4] This communiqué was put in by Counsel for the Spanish (Franco) Government, who prayed that the Court should take notice of the Notes by the exchange of which the arrangement therein referred to was effected. The Court wrote to the Ministry of Foreign Affairs asking whether there was any objection on the part of the Ministry to its taking notice of the contents of the Notes. In reply, the Ministry intimated that, by royal decree, the King had consented to communication of the Notes for examination *in camera*. At a session held *in camera* the Court examined the Notes, the Ministry's letter, and its report on the basis of which the Decree was made; and heard argument from Counsel for both parties. In the course of his judgment Lie J. said:[5]

> 'The Norwegian Government has expressly declared that the exchange of notes

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[1] Decision of the Supreme Court in Civil Cases of 26 April 1928, No. R. 1. 305 (Váž. 8000 Civ.): see *Annual Digest*, 1927–8, p. 370.

[2] *Campuzano* v. *Spanish Government*, District Court of Aker, 15 March 1938; Supreme Court, 2 November 1938: *Revue de Droit international et de législation comparée*, Ser. III, 20 (1939), p. 413; *Annual Digest*, 1938–40, Case No. 27; ibid., 1919–42, Case No. 43.

[3] *Banco de Bilbao* v. *Sancha and Rey*, [1938] 2 K.B. 176, and *The Arantzazu Mendi*, [1938] p. 233; [1939] p. 37; [1939] A.C. 256.

[4] Cf. the exchange of agents between Great Britain and the Spanish Nationalist Authorities in 1938: see *Modern Law Review*, 3 (1939), p. 4; and House of Commons *Official Report*, vol. 328, cols. 1125, 1126; vol. 329, col. 834.

[5] Dissenting from the other six judges, but on a point not presently relevant.

does not constitute on its part a recognition in international law of the Franco government, and in my view nothing has been adduced in evidence which could justify a disregard of this declaration.'

The rule is that a declaration of the Executive to the effect that a government is recognized *de jure* is binding on a Norwegian court; as regards recognition *de facto* the court is at liberty to look elsewhere for assistance and information. The communication as to recognition *de facto*, and perhaps the recognition itself, is not conclusive on the court.

In Switzerland, the courts are not obliged to apply to the Government for information on these matters. For practical reasons they generally do so in case of doubt. It is not clear whether or not the reply of the Government is conclusive.

Treaties. Treaties are a subject on which courts have frequently had to consider their relationship with the Executive. This is particularly so in France.[1] The following series of cases illustrates French judicial caution in handling a topic deemed to be reserved to the Executive, a caution combined with judicial reluctance to ascertain from the Executive the true state of affairs.

Three treaties were signed between Russia and France on 1 April 1874, dealing with Commerce and Navigation, Consuls, and Succession respectively. The second and third were duly denounced by France: the denunciations became effective, in the terms of the treaties, 'after one year from the publication in the *Journal Officiel*'.[2] The first treaty (Commerce and Navigation) was not denounced. In *Airdoff* v. *Boda*,[3] Airdoff had been appointed Russian Consul-General under the Consular Treaty of 1874; his exequatur was dated 3 November 1917. His attempt to exercise his rights over the movables of B. deceased was resisted on the ground that Russia had no recognized Government to whom he could report under the Treaty, which therefore could not be carried out. It was held that, the Treaty not having been denounced by the French Government as therein provided, the Court could not, without exceeding its powers, declare the Treaty to have lapsed or to be suspended.[4] The dilemma was solved by the Executive itself in a way which, so far as the reports go, seems to be unique in these cases. A note in *Clunet*[5] states:

> 'Cependant, notre Ministère des Affaires étrangères aurait, à l'occasion de l'arrêt rapporté, fait connaître officieusement à la Cour qu'il tenait — dans le présent état

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[1] See *Annual Digest*, 1929–30, p. 360, for a Note on the practice of French courts with regard to treaties, their interpretation, &c.; and cf. p. 190, *supra*.

[2] *Journal officiel*, 19 May 1921, p. 5890.

[3] Cour de Paris, 9 February 1921: *Clunet*, 48 (1921), p. 229.

[4] The Court expressed itself further thus: 'Non-recognition of a state is equivalent to outlawry; to be held juridically non-existent is worse than to be a belligerent.'

[5] At p. 231.

des circonstances — pour non caducs les Traités conclus par la France avec la Russie en 1874.'

The date of the communication to the Court is not mentioned, but a few weeks later the French Government removed all doubts for the future by denouncing, as stated, the Consular and Succession Treaties.[1] The opportunity was not, however, taken to denounce the Treaty of Commerce and Navigation, under which Russians were guaranteed access to French courts. In *Titoff* v. *Titoff*,[2] the Court treated it as being still in force, despite the fact that 'the Government in Russia was *de facto* only'. The Court may possibly have been moved by the fact that this was a matrimonial cause, and to refuse to hear it would be to deprive the parties of any access to any court, as (it was said) there were none in Russia.

Nearly a year after the denunciation of the Consular and Succession Treaties, in the case of *Jouditsky* v. *Givatovsky*,[3] the Court of First Instance was able to declare that the Commercial Treaty of 1874 had not been denounced, but on 31 May 1923, this was reversed somewhat dramatically on appeal[4] with the announcement by the Court that the Treaty had been denounced by the Russian Government on 11/24 October 1917 'and the Minister of Foreign Affairs himself recognises that it can no longer be invoked by Russians'. How this fact came to light is not at all apparent from the judgment in *Jouditsky* v. *Givatovsky*, but there is printed in *Clunet* for 1924[5] the full text of a letter dated 22 May 1923, from the Minister of Foreign Affairs to a Monsieur Nossovitch, of Paris. It would seem that Nossovitch had asked the Minister for what reasons the Treaty had been denounced, and whether the Russian Government in denouncing it had not intended only to annul the economic clauses. The Minister pointed out that the Treaty having been denounced by the Provisional Russian Government in 1917, it could not continue to subsist in part only without a special agreement to that effect. The Treaty had been denounced in accordance with its terms, and ceased then to be in force without any need for the French Government to notify its own denunciation to the Russian Government. The Minister was not required by law to publish a denunciation in the *Journal officiel*. The letter continued, blandly enough:

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[1] In *Akhmetoff* v. *Russian Consul*, the Court of Appeal of Aix on 7 February 1922 gave a decision which ignored the denunciation of the Treaty of 19 May 1921. This was an appeal from the Civil Tribunal of Nice of 28 July 1920, holding that the Consular Treaty was not enforceable, seeing that there were in Russia neither an established government nor organized courts. The Appeal Court rejected this thesis as 'contrary to the attitude of the [French] Government, which had neither revoked the exequatur of the Consul nor proclaimed the inapplicability of the treaty'. The Court could not, therefore, contest the powers of the Consul (*Clunet*, 51 (1924), p. 157).

[2] Civil Tribunal of the Seine, 11 June 1921: ibid. 48 (1921), p. 525. See also, in the same sense, *Bermann* v. *Bermann*, same Court, 24 December 1921: ibid. 49 (1922), p. 116.

[3] Commercial Tribunal of Antibes, 21 April 1922: ibid. 50 (1923), p. 534.

[4] Court of Appeal of Aix, 31 May 1923: ibid. 51 (1924), p. 104.

[5] Ibid. 52 (1924), p. 286.

'I would add that if certain judicial decisions have continued to invoke the Treaty in question, the sole conclusion to be drawn is that the parties have been insufficiently informed on the state of the law.'

There is no indication in *Clunet* of the circumstances in which this letter came to be written, nor of who Monsieur Nossovitch was, but the near coincidence of the dates suggests that he may have been connected with the appeal in *Jouditsky* v. *Givatovsky*. A further conclusion to be drawn, it is respectfully submitted, is that there is something to be said for making early inquiry of the Foreign Office when the position of a treaty is in doubt.[1]

The courts in Germany have had occasion to define the function and effect of official announcements regarding treaties in the official 'Gazette' (*Reichsgesetzblatt*) in much the same way as have the French courts with regard to the *Journal officiel*.[2] Thus in a decision given in 1926 the Reichsgericht für Strafsachen (criminal matters) made clear the distinction between the publication in the *Reichsgesetzblatt* of the text of a treaty and a mere announcement as to its ratification; and its judgment probably had the effect (although this is not clear from the available reports) of accelerating the coming into force of the Treaty of Versailles 'as between the Reich and German subjects'. The Court held that the Ministry's announcements on the ratification of this and other treaties were not in the nature of commands ordering that the treaties should be obeyed. They merely defined the time and scope of their operation.[3]

Interpretative declarations. The communications of the Executive noted in this article have all been *ad hoc* declarations, made for the purpose of the case before the court. Mention should, however, be made of a special method by which the French Foreign Office has placed on public record the official view of some aspect of a treaty, and which the courts have accepted as binding on them. The Interpretative Declaration was reviewed in *Comptoir Tchécoslovaque and Liebken* v. *New Callao Gold Mining Co.*[4] Under the Anglo-French Commercial Treaty of 28 February 1882, British subjects in France were accorded most-favoured-nation treatment. Interpretative Declarations by the Ministry of Foreign Affairs published in the *Journal officiel* in July and August 1929 explained that the most-favoured-nation clause gave British subjects the right to avail themselves of those French laws which assimilated the status of foreigners to that of French nationals. The Court held that the Interpretative Declarations must be read with and deemed to form part of the text of the Treaty, and were binding on the courts. It appears from *Lloyds Bank* v. *De Ricqlès and De Gaillard*[1] that what was published in the *Journal officiel* in July/August 1929 was an exchange of letters in May 1882 between the British Ambassador at Paris and the French Foreign Minister; and between the Foreign Minister and the Garde des Sceaux. This Interpretative Declaration was cited by the Bank in support of its contentions, and was accepted by the Court as binding.[2]

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[1] See, on the matter of the undisclosed denunciation, a note by Grouber and Tager in *Clunet*, 51 (1924), pp. 8 and 12–15. On p. 161, in a note to *Akhmetoff* v. *Russian Consul* (*supra*, p. 200), the same writers state that, despite the denunciation, Russian consuls continued to exercise their functions in France, and the Ministry of Foreign Affairs to legalize their signatures.

[2] See, for example, *Schneider* v. *Cie C. Jaudon*, Court of Paris, 24 March 1933: *Sirey*, 1935, Part II, p. 201; *Dalloz Hebdomadaire*, 1933, p. 354; *Gaz. des Tribunaux*, 12/13 May 1933; *Annual Digest*, 1933–4, Case No. 32, sub nom. *Banque de l'Union Parisienne* v. *Jaudon*, on the promulgation of the diplomatic documents relating to the recognition of Russia by France, and *Russian Trade Delegation* v. *S.A. des Entreprises Gère and Banque Commerciale pour l'Europe du Nord*, Civil Tribunal of the Seine, 7 January 1930: *Clunet*, 58 (1931), p. 413; *Annual Digest*, 1929–30, Case No. 8, on a notice in the *Journal officiel* regarding the Russian Trade Delegation.

[3] 25 September 1926: *Fontes Juris Gentium*, Series A, Section II, vol. i, No. 205; *Annual Digest*, 1919–22, Case No. 234, sub nom. *Publication of Treaties* (*Germany*) case (and see Note at p. 323).

[4] Civil Tribunal of the Seine, 4 March 1930: *Clunet*, 57 (1930), p. 960; *Annual Digest*, 1929–30, Case No. 234. See also *Ministère Public* v. *King*, p. 190, *supra*.

It has recently, however, become the practice of the Conseil d'État to insist on a specific interpretation of a treaty by the Foreign Office, as, for example, it did in *Minister of Public Works* v. *Duhamel*.[3] The defendant was alleged to have infringed the Franco-Belgian Boundary Convention of 15 January–31 May 1866, by erecting a building too near to the Lille–Audenaard Road, which formed part of the frontier. He contended that the prosecution had misinterpreted the terms of the Convention, but the Conseil d'État refused to consider the point. Holding that, as an administrative court, it was not competent to interpret an international convention, it adjourned the case until an interpretation had been given by 'the competent authority', i.e. a government department.[4]

Questions as to territory, the existence of war, &c. There are certain special matters of fact which are properly and peculiarly within the knowledge of the Executive in a state, and courts frequently turn to the Executive—

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[1] *Clunet*, 58 (1931), p. 1018; *Sirey*, 1931, Part II, p. 97; *Annual Digest*, 1929–30, Case No. 252.

[2] On the interpretation of treaties by the French Ministry of Foreign Affairs, see Duez, op. cit., p. 57; and see Lauterpacht, op. cit., p. 389. See also a Note on Ministerial Interpretative Declarations in *Annual Digest*, 1929–30, p. 361.

[3] *Sirey*, 1935, Part III, p. 25; *Dalloz Hebdomadaire*, 1935, p. 71; *Annual Digest*, 1933–4, Case No. 191 (and Note thereto).

[4] On the application by the Conseil d'État of the principle of *questions préjudicielles* rather than that of *actes de gouvernement*, see *Annual Digest*, 1933–4, p. 432, Note. Cf. *In re Société des Établissements Alkan & Co. and Others*, decided by the Conseil d'État on 11 June 1937, holding that its decision would have to depend on an interpretation of the Franco-Yugoslav Convention of 27 January 1933, and suspending judgment until such an interpretation had been given by the Ministry of Foreign Affairs (*Dalloz Hebdomadaire*, 1937, p. 442; *Sirey*, 1937, Part III, p. 108; *Recueil Général*, 1937, Part 3, p. 99; *Nouvelle revue de Droit international privé* (1937), pp. 566–8; *Revue critique de Droit international*, 33 (1938), pp. 455–7; *Annual Digest*, 1935–7, p. 348); and *La Compagnie des Services Contractuels des Messageries Maritimes* v. *Tito Landi*, decided by the same Court on 23 December 1936, holding that it was not competent to interpret Art. 40 of the International Postal Convention of Stockholm of 28 April 1924. Judgment was suspended until the plaintiffs 'produced evidence that they had applied to the Ministry of Foreign Affairs for, and had obtained, an interpretation of Article 40' (*Gaz. du Palais*, 2 February 1937; *Clunet*, 64 (1937), p. 771; *Annual Digest*, 1935–7, Case No. 216).

usually the Foreign Office—for information on such matters, either as to the actual fact in dispute, or even as to the law on the matter.[1] An example of such a matter of fact is the question whether a given part of the earth's surface is within one or other national jurisdiction. Thus, in 1925, Teschen was plebiscite territory, and in one case[2] the question arose whether it was part of the Czechoslovak 'Customs Territory'. The case went on appeal to the Supreme Court, which ordered a new trial, suggesting that the Court below could ascertain the position 'by enquiry at the Ministry for Foreign Affairs'.

The reference to the Executive may, however, as mentioned, be to learn the governmental attitude to the law applicable. Two German cases on the extent of foreign territorial waters illustrate this. In *The Elida*,[3] it was contended that the seizure of a vessel was illegal seeing that (*inter alia*) it took place within four miles of the Swedish coast, i.e. within the zone of neutrality claimed by Sweden. According to a communication from the German Foreign Office to the Imperial Supreme Prize Court, Germany, especially in the course of the discussions on the matter which took place in 1914, did not accept Sweden's point of view, but treated the question of national waters as an open one. Again, in *The Senator Schröder*,[4] the question was whether the captain of a German fishing-boat was guilty of illegal fishing in Icelandic waters. The Icelandic Government had by its Decree of 5 November 1928 introduced a new fishery limit, three sea miles from a line drawn between the extreme edge of bays on the coast. The incident which led to the present charge occurred between this new limit and the former limit. The requisite information was supplied by the Minister of Defence: 'No international agreement has yet been reached on the question of what is to be regarded as a bay.' The Court, holding that Germany did not recognize the new limit, considered the 'slight indentation' in the coast-line where the incident occurred, and decided that it could not be a bay.

Another question of fact for which courts rely on Foreign Offices or other government departments is 'the question whether a state of war exists with a foreign country or between two foreign countries'.[5] In Belgium the question is solved by reference to the *Moniteur Belge*, the official gazette. If a state of war exists in Belgium, it has to be published in the *Moniteur* to enable the Executive to exercise the powers arising out of it. If a state of war exists between two other countries, a declaration of neutrality will similarly be published in the *Moniteur*. Some such practice is generally followed in European countries. Occasionally, however, application is made by the court to the Executive for a statement on the question. Thus after the Second World War, for example, the question arose in a Greek case:[1] was Greece at war with Hungary? A Greek national brought an action against a Hungarian for the recovery of possession of certain premises. By Greek law,[2] subjects of states at enmity with Greece were denied the protection of landlord and tenant legislation. The Court first examined the general principle of international law as to what is an enemy state. There had been no formal declaration of war between Greece and Hungary, and no hostilities had occurred between their respective armed forces. A communication from the European Department of the Political Branch of the Ministry of Foreign Affairs certified that there was no state of war between the two countries, although diplomatic relations between them had been broken off; and a communication was received from the Treasury Department stating that, no royal decree or other administrative order having declared Hungary to be an enemy of Greece, the property of Hungarian nationals in Greece had not been sequestrated. Thus advised, the Court held that 'Hungary is not an enemy of Greece in this War'.

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[1] See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht), § 357*a*; see also Lauterpacht, op. cit., p. 388; and cf. this *Year Book*, 23 (1946), p. 240.

[2] 29 December 1925: Váž. 5592 Civ.; *Annual Digest*, 1925–6, Case No. 82, sub nom. *Czechoslovak Spirit Duty (Plebiscite)*, Case No. 11.

[3] 1 *Entscheidungen des Oberprisengerichts*, p. 9; Hudson, op. cit., p. 398; *A.J.* 10 (1916), p. 916.

[4] Hamburg Maritime Court (*Seeamt*), 13 June 1932: *Hanseatische Rechts- und Gerichtszeitschrift*, Part B, 5 November 1932; *Annual Digest*, 1931–2, Case No. 61.

[5] For a case on the question whether Egypt was at war with Germany in 1914, see *Heinrich Finck* v. *Egyptian Government*, decided by the Egyptian Court of Appeal on 1 March 1927. The Court found that there was no declaration of war between Egypt and Germany, but held that the decision published in the official journal in 1914 'with a view to assure the defence of Egypt in the war between Germany and Great Britain', by which the Government authorized the forces of His Britannic Majesty which were already in occupation of the country to exercise rights of war

In Holland, the conduct of foreign affairs is a royal prerogative which the courts must not question. They are bound to accept the guidance of the Executive in all matters affecting foreign relations.

Reference to the Executive for guidance was thus made by a Dutch court in 1926 on the question whether the new Austrian Republic was identical with the former Austrian Monarchy. The Court inquired of the Dutch Government, who replied that diplomatic correspondence had taken place with the Austrian Government, and there was a variance of opinion on the point. The Dutch Government considered the former and the new Monarchy to be juridically identical. Austria denied this, but nevertheless had agreed to be bound by the Hague Convention on Civil Procedure of 1905. Hence the Court held that it 'had to respect the agreement reached between the two Governments and, therefore, in the case under consideration, it was not for the Court to enter into an examination of the question whether the Austrian Republic has to be considered as

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in the ports and territory of Egypt, was an 'act of Sovereignty', into which the Court was not competent to inquire (*Gaz. des Tribunaux Mixtes*, 17th Year, 1927, p. 257; *Clunet*, 55 (1928), p. 194; *Annual Digest*, 1927–8, Case No. 25).

[1] *Re A.B.*, Court of Appeal of Athens, Judgment No. 564 of 1945: *Thémis*, 1945, p. 398; *Annual Digest*, 1943–5, Case No. 96.

[2] Law No. 255 of 11 April 1945.

continuing the existence of the former Austrian Monarchy according to the Law of Nations'.[1] The Court thus took refuge in the (informal) agreement between the two Governments to the effect that the Convention of 1905 should be considered binding, so avoiding the fundamental question before it. It is interesting to speculate whether the Court would have accepted as binding the opinion of the Netherlands Government on the question of Austria's continued existence, had such an agreement not been arrived at, and whether, in that event, the Court would have admitted the Austrian thesis as correct.

State-owned vessels. An interesting group of cases illustrates how continental courts have dealt with claims to immunity lodged on behalf of state-owned vessels involved in litigation in foreign ports. No reference to the Executive seems to be necessary. In *The Panguin*[2] the Commercial Tribunal of Antwerp allowed the claim of the captain of a ship owned by the Portuguese Transportos Maritimos do Estado that an action against him was in fact brought against the state of Portugal, and dismissed the action for lack of competence. Four French cases were similarly decided. In *The Saabrock*,[3] the Court of Appeal of Rennes admitted the captain's claim of immunity for a ship owned by the British Government, even though it was operated by a private company. The plaintiff objected that the captain had no *locus standi in judicio*, but the Court held that, since the operating company and the captain were agents of the British Government, the captain had the right to raise any defence which might be raised by that Government, including the defence of exterritoriality. In *The Campos*,[4] judgment had been signed against a ship, formerly German, which had been requisitioned by Brazil. The captain intervened and applied to set aside the judgment on the ground of immunity. He produced documents of title to show that the ship was the property of Brazil. The Court held that this was sufficient, and expressly refused to inquire into how the ship had been acquired.[1] Again, in *The Avensdaw*,[2] in 1922, the United States Shipping Board successfully set up a claim of immunity without joining the United States Ambassador, or making any approach to the French Government to present its claim to the French court, as the American courts were at that time requiring to be done.[3]

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[1] *Erste Allgemeine Unfall- und Schaden-Versicherungs-Gesellschaft of Vienna* v. *A. J. van Rijt*, District Court of Amsterdam, 29 October 1926: *Weekblad van het Recht*, 30 May 1927, No. 11659; *Annual Digest*, 1927–8, Case No. 20. And cf. the somewhat similar Swiss case *In re J.Z.*, decided by the Obergericht (Court of Appeal) of the Canton of Zürich, 16 February 1921. The Court below had ordered the plaintiff, described as 'of Bohemia', to give security for costs. He appealed, contending that, as Czechoslovakia was formerly part of Austria-Hungary, which was a party to the Hague Convention on Civil Procedure, Czechoslovakia was itself a party. The appeal was dismissed on the ground that Czechoslovakia had not declared its accession to the Convention, and could only be a party by virtue of state succession. But according to information given by the Swiss Department of Justice, Czechoslovakia had refused to be regarded as the successor of the former Austrian state, or as a party to treaties entered into by Austria-Hungary. This information was accepted by the Court (*Blätter für Zürchenische Recht-Sprechung*, vol. xxi, p. 23; *Annual Digest*, 1921–2, Case No. 43).

[2] 12 July 1923: *Revue de Droit maritime comparé*, 4, p. 213, cited by Feller in *A.J.* 25 (1931), p. 92. The ship and its owner had already been before the courts, in the case of *Portuguese State* v. *Sauvage, Steamers 'Lima' and 'Panguin'*, decided in 1921 by the Court of Appeal of Brussels, which held: 'il n'est permis de déduire que [Transportos Maritimos do Estado] constitue une personne morale distincte de l'État. Que cette interprétation est corroborée par le titre de l'armement . . . et en outre par les déclarations des autorités diplomatiques et consulaires portugaises' (*Pasicrisie Belge*, 1922, p. 253, cited in *A.J.*, Supplement, 26 (1932), p. 721).

[3] *Saabrock* v. *Soc. Maritime Auxiliaire de Transport*, Court of Appeal of Rennes, 29 June 1918: *Revue de Droit international privé*, 18, p. 473.

[4] *The Campos* v. *Comp. des Chargeurs Réunis*, Commercial Tribunal of Havre, 9 May 1919: *Clunet*, 46 (1919), p. 747. In *Socifros* v. *U.S.S.R.*, decided by the Civil Tribunal of Toulon,

In Holland, however, in a recent case,[4] the Court has not been satisfied with a claim for immunity supported by the diplomatic representative of the claimant state. A cargo of oil had been attached. Mexico commenced an action for its release, contending that the oil originated from an oil-field which had always belonged to the Mexican state, and which had not been appropriated from a foreign oil company.[5] The Mexican Chargé d'Affaires at The Hague produced a declaration on behalf of his Government to that effect, but the Court rejected it as being 'a mere declaration *ex parte*, without conclusive force'.

Latin America. It would appear from the available sources that the courts of Latin-American countries are not often confronted with the type of case which is the subject of the present study. Inquiry by the court of the Executive seems to be rare. What often happens is that a question of fact, whether or not of an international law nature, is referred to an officer known as the Fiscal, who is not an officer of the Executive. He is an officer of the court, and his functions resemble those of a master, or a referee for inquiry and report. He sits in private, and there is no public record of the

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23 April 1938, and (on appeal) by the Court of Appeal of Aix, 23 November 1938—an action against the U.S.S.R. by a firm carrying on business in Russia, and which arose out of a decree confirming the seizure of a vessel—it was admitted that the vessel was the property of the Soviet state, and that merchantmen owned by a sovereign state cannot be seized by creditors of that state (*Revue critique de Droit international*, 34 (1939), pp. 303 and 309; *Dalloz*, 1939, Part 2, p. 65; *Annual Digest*, 1938–40, Case No. 80).

[1] Similarly, in *Esnault-Pelterie* v. *A. V. Roe & Co. Ltd.*, decided by the Civil Tribunal of the Seine, 1 April 1925—an action for the infringement of patents, in which the defendants claimed that they were agents of the British Government and pleaded to the jurisdiction—the Court, finding for the defendants, refused to inquire further into the facts, as this would be discussing the decisions of the British Government (*Clunet*, 52 (1925), p. 702).

[2] Commercial Tribunal of Rouen, 20 January 1922: *Revue de Droit maritime*, 34, p. 1074, cited by Feller, op. cit., p. 92.

[3] After *Ex Parte Muir* (1921), 254 U.S. 522; *Annual Digest*, 1919–22, Case No. 97; and see this *Year Book*, 24 (1947), p. 120.

[4] *United States of Mexico* v. *Batsafsche Petroleum Mij.*, District Court of Middleburg, 2 August 1938: *W. & N.J.*, 1938, No. 790; *Annual Digest*, 1919–42 (Supplementary Volume), Case No. 7.

[5] Under the Expropriation Law of 23 November 1936 and Presidential Decree of 18 March 1938.

method by which he obtains his information. Thus, in the Uruguayan case of *In re Ledoux*,[1] the secretary and an attaché of the French legation in Uruguay petitioned the Court, on the ground of their diplomatic status, to have their deposits at a bank released from a judicial moratorium suspending all payments by the bank. The Court referred the claim to the Fiscal, and, accepting his report, granted the petition.

On questions of the territorial limits to their jurisdiction, however, Latin-American courts apply to the Executive for information. Thus, when Alberto Brown surrendered to the Panamanian authorities for a crime committed in a place described as being 'under the jurisdiction of Costa Rica but close to the Panamanian boundary', the Judge of first instance applied to the Superior Judge of the Republic to ascertain whether there was jurisdiction. The National Procurador-General (presumably on the inquiry of the Superior Judge) informed the Supreme Court that the boundary between Panama and Costa Rica had not been definitively marked, but that the *status quo* decided upon in 1891 was still observed. The Court held that, since Costa Rica claimed jurisdiction under the *status quo* of 1891, and since the Penal Code of Panama[2] did not in general punish crimes committed abroad, the Panamanian courts had no jurisdiction to try Alberto Brown.[3]

Seeing that Argentina possesses a land frontier several thousands of miles long and common boundaries, not all clearly defined, with five other states, it is not surprising that the Argentine Ministry of Foreign Affairs has a Division of International Boundaries. When an Argentine court is called upon to decide a question concerning part of a disputed area on or near one of the state's boundaries, it will turn to the Foreign Ministry for guidance as being a particularly well-informed agency and hence the best available evidence. That is what happened in *Provincial Bank of Salta* v. *Francisco Milanesi*,[4] an action for the appropriation of land on the border of Bolivia. The defendant claimed that the Argentine courts had no jurisdiction, the land being not in the Province of Salta (Argentina), which merely exercised *de facto* control, but in Bolivia. The Court made inquiry of the Ministry of Foreign Affairs, which supplied information from the Division of International Boundaries to the effect that:

> 'the Argentine Nation exercises *de jure* and *de facto* sovereignty up to the 22nd parallel . . . the Province of Salta and the Nation exercise effective and undisputed jurisdiction south of the 22nd parallel; . . . the localities of T. and A., both on our railways from

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[1] Supreme Court, 17 January 1941: *Jurisprudencia Abadie-Santos*, vol. 61 (1942), Fasc. 149–51, No. 12,592.

[2] Penal Code (1922), Arts. 5–8.

[3] *In re Alberto Brown*, Supreme Court, 5 February 1920: 27 *Registro Judicial*, 103; *Annual Digest*, 1929–30, Case No. 66.

[4] Federal Supreme Court, 10 March 1937: *Revista de Jurisprudencia Argentina*, 57, p. 632; *Annual Digest*, 1935–7, Case No. 50.

> E. to Y., are 12 and 5 leagues respectively south of the 22nd parallel . . . with police and judicial authorities dependent on Salta and the post office dependent on the Nation.'

Thus informed, the Court held that it had jurisdiction to expropriate the land.[1]

The Argentine Federal Court also sought of the Foreign Ministry information as to the status of the Falkland Islands (Malvinas), when it had to consider a petition for naturalization by a person born there in 1908. That information recited the history of the Malvinas Archipelago; its occupation by the British Navy in 1833 and the protest by the Argentine Minister in London at the time; and that the Argentine Government had constantly maintained its protest against the occupation 'calling attention at all times to its rights and jurisdiction over the Islands'. The Court deduced from this information that the land in question continued to form *de jure* part of the territory of the state and hence the petitioner was already an Argentinian citizen by birth and needed no naturalization.[2]

If the Mexican case of *Re Muñoz*[3] is a criterion, then the judicatures of Latin America are more than content to leave to the Executive questions of fact of the type under consideration; they insist on doing so. Muñoz was arrested in Mexico and his extradition to Cuba ordered for a crime committed in Cuba. He appealed to the Supreme Court, contending (*inter alia*) that he could not be extradited because, owing to a change in the Cuban Government, the Legation could not properly request his extradition. His appeal failed, the Supreme Court holding that it was within the sole competence of the Executive to grant the request for the extradition, coming as it did from the representative of a foreign government accredited to Mexico. As the Court itself put it:

> 'It does not fall to the judicial power of the Federation to pass on or decide concerning the existence or non-existence of a foreign legation, nor the attributes which it can exercise.'

On the other hand, in a case[4] involving a vessel owned by the United States Shipping Board Emergency Fleet Corporation, on the question whether it was immune from the jurisdiction of the Argentine Courts as being a state-owned vessel, the Federal Court of Appeal made no inquiry of the Foreign Ministry. The Court contented itself with relying on the fact that the courts of the United States and other countries had held the Corporation to be separate and distinct from the United States,[1] and the Argentine judges decided in conformity with their brethren abroad.

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[1] The Court preferred the information contained in the Communication from the Foreign Ministry to 'the definitive demarcation of the boundary between Argentina and Bolivia in accordance with the Explanatory Treaty of La Paz of July 9, 1925, which has not yet received legislative approval', cited, it may be supposed, in the contentions of the defendant, and which would place the land in question in Bolivia. The Court refused to consider what the eventual effect on its judgment of the coming into force of the Treaty would be.

[2] *In re Carlos Gleadell Watson*, Federal Court of Rio Gallegos, 11 February 1935: *Revista de Jurisprudencia Argentina*, 49, p. 188; *Annual Digest*, 1935–7, Case No. 61.

[3] *In re Ernesto Diaz Muñoz*, Supreme Court, 8 July 1921: *Seminario Judicial*, vol. 9, 5*a* Epoca, p. 112; *Annual Digest*, 1919–22, Case No. 196.

[4] *Cia Introductora de Buenos Aires* v. *Capitan del Vapor 'Cokato'*, 19 November 1924: *Jurisprudencia Argentina*, 14, p. 705; *Annual Digest*, 1923–4, Case No. 71.

Conclusions

The object of this and the two preceding articles[2] has been to review the relationship between the Judicature and the Executive in, respectively, England, America, and some of the principal European countries, in certain matters arising from or bearing upon questions of international law. It has been shown how in England the courts at one time considered themselves free to receive evidence of any kind or from any source in support of claims for immunity, whether for states or for individuals; and how they gradually moved to a position where application to the Executive for information has become a regular practice. Moreover, the information received is not to be regarded by the courts as evidence, to be sifted and tested; the communication is binding upon the court according to its tenor,[3] and attempts either to challenge it or to look behind it[4] have met with judicial reprobation.[5] Reported cases of the Executive intervening to protect foreign interests or susceptibilities are rare.[6] The initiative has usually come from the parties, as in *Re Suarez*,[7] or from the Court itself, as in *The Charkieh*.[8]

In the United States, where emphasis has been on claims for jurisdictional immunity of sovereigns and governments rather than for diplomatic immunity, the device of the 'Suggestion' of the State Department enables the Executive to intervene in any pending legislation, either of its own accord or at the request of the foreign Government affected. The tendency noted is twofold: In the first instance, the courts are greatly exercised lest they should by an untoward decision embarrass the Executive. The impression may thus be given that the deliberations of the courts are informed by political expediency rather than by legal principles—an impression which judges in the United States would justly deny. The other tendency is to remit to the diplomatic channel the private individual seeking redress against a foreign government—a tendency which may have a faint echo in the English Diplomatic Immunities (Extension) Acts, 1941 to 1946, which substitute official lists published in the organ of the Executive for *ad hoc* inquiries in the course of litigation.[1]

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[1] The Court referred to: *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation*, 1 May 1922, 258 U.S. 549; a case decided by the Commercial Tribunal of Marseilles on 11 January 1921, reported in *Revista Internacional de Derecho Marítimo*, 33, p. 167; and *The West Chatala*, decided by the Hanseatic Tribunal, 30 April 1921, reported in ibid., 34, p. 233.

[2] See above, p. 180, n. 1.

[3] Dr. F. A. Mann (in *Transactions of the Grotius Society*, 29 (1944), at p. 143) calls this the 'rule of obligatory certification'—a name which is perhaps likely to be misunderstood as it suggests that the Executive is obliged to give its certificate.

[4] As, for instance, in *The Amazone*, [1939] P. 322.

[5] Since the first article was published, in 1947, matters have gone a stage farther, and, in the virtually unreported case of *Price* v. *Griffin*, the Foreign Office wrote to the Court, before the case was called on, a letter stating that the defendant had diplomatic immunity, which the Court accepted unquestioningly as conclusive and prohibitory (see *The Times* newspaper, 23 February 1948; *International Law Quarterly*, 2 (1948), p. 266).

[6] The Attorney-General intervened on behalf of the Crown in *The Parlement Belge* (1879), 4 P.D. 129, and appeared 'at the request and on behalf of the Foreign Office', in *Musmann* v. *Engelke*, [1928] 1 K.B. 90 (see this *Year Book*, 23 (1946), pp. 259 and 273 respectively).

[7] [1918] 1 Ch. 176.

[8] (1873), L.R. 4 A. & E. 59; L.R. 8 Q.B. 197.

On the continent of Europe Montesquieu's principle of separation of powers[2] is frequently proclaimed by the judiciary and generally relied on. This leaves the courts formally free to seek information where they will. In a few countries, exceptionally, application must by statute be made to the Executive when questions relating to treaties or to exterritoriality arise. For the most part, however, the courts in Europe may test any claim for immunity by their own investigations, limited only by the general rules of evidence. Reference to the Executive on questions of diplomatic relations is, however, frequently made, seeing that such questions are in the first instance determined by the Government itself, with the result that the Government is best qualified to supply information concerning them. In its reply, the Government speaks merely as to the existence of facts which it has itself created or on which it must be regarded as having expert knowledge or better means of information than the courts. Except, however, where so compelled by the legislative provisions mentioned, continental courts are not bound to accept the answers of the Executive as conclusive and exhaustive. They are for the most part at liberty to draw their own conclusions, to set their own value on the declaration of the Executive, to supplement it, or to dissent from it, if necessary, in order to give effect to the acknowledged rules of international law.

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[1] See this *Year Book*, 23 (1946), p. 281.

[2] *L'Esprit des Lois*, Book XI, ch. vi; and see C. K. Allen, *Law and Orders* (1947), p. 6. But see also Lauterpacht, op. cit., p. 389.

THE 'OPEN OFFER' FORMULA AND THE *RENVOI* IN PRIVATE INTERNATIONAL LAW

By WALTER RAEBURN, K.C.

I. *Definition of the formula*

THE 'open offer' formula may be stated in the following way. Where in a given case there is a conflict between the laws of two countries as to which law should properly apply, the law of the forum, having chosen the law of the other country in its entirety, notionally offers to apply either the other's internal law or the law of any third country to which it may be redirected. Thereupon, according to what is proved to be the law of that other country as to the acceptance or rejection of such an offer, its internal law or the law of the third country (subject to a like offer) or (in the event of rejection) the internal law of the forum, is applied. In the circumstances, the expression 'open offer' is suggested as a convenient name by which to identify the formula. Further, as it is in the English courts that it has in modern times been repeatedly applied, it is against the background of the English line of decisions that it is proposed to examine it. For this reason too it is not intended to analyse critically the conception of the *renvoi* as such. Nor is it proposed, in touching upon the advisability of the *renvoi* as a legal idea, to do more than inquire whether the doctrine should or should not be adopted by the courts of any country, and if adopted, on what basis it should be accepted, or how and in what circumstances it should be applied. Since in English law the *renvoi* is generally admitted to have been adopted, and since its adoption seems unlikely now to be repudiated,[1] the most effective line of approach to the topic should be one by which the form in which it has come to be incorporated into English law may be seen, by which the steps are traced whereby that form has come to be evolved, and by which the basis that it rests upon can be critically examined, in the light both of abstract theory and of judicial reasoning. In that way the full implications of the English law as it now stands may clearly appear and be understood.

II. *The Duke of Wellington case*

The point, then, of departure for such an inquiry is the most recent decision of the English courts. This, at the time of writing, is *In re Duke of Wellington*,[2] which came before Wynn-Parry J. in April and May 1947. The matter went to appeal,[3] but only on two points not involving the question of the *renvoi*. The decision is, therefore, still one of a court of first instance, and the 'open offer' formula, of which it stands at present as the consummation, yet awaits the benediction of an appellate court.

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[1] But see *contra*, Morris, 'Renvoi', in *Law Quarterly Review*, 64 (1948), p. 264.

[2] [1947] Ch. 506.

[3] [1948] Ch. 118.

The relevant facts, briefly stated, were that the sixth Duke of Wellington, who was killed in action in 1943, had made a will in Spanish form disposing, amongst other things, of certain immovable property of his in Spain. The question was whether, the matter having been classified as one of succession to immovable property[1] to which, according to the English conflict rules, the *lex situs* was applicable, the ultimate result should be the application of Spanish or English international law. The decision was in favour of English law. In arriving at this conclusion, the learned Judge used the following process of reasoning, each stage of which calls for careful examination. First, as regards the extent of the *lex situs* to which he was referred, he held himself conclusively bound by authority to find that that was the whole law of Spain, including the Spanish conflict rules, by which he was referred back to English law.[2] Thereupon he considered himself bound to inquire, as though sitting in a Spanish court, whether Spanish law would or would not accept what was in effect an English open offer to return the case for determination in accordance with Spanish internal law. The final result was based on his conclusion of fact that the Spanish law would not accept such an offer.

The primary matter of interest is the legal authority which the learned Judge professed to follow. The choice of law, as his first step, seems to call for no comment.[3] From that point of departure, however, his judgment deserves some detailed attention. The following passage[4] contains the vital reasoning:

> 'The second step also appears to me to present no difficulty. For when it is asked whether by the phrase "Spanish law" is meant only the internal law of Spain or the whole of the law of Spain, including therein the body of rules of private international law recognized and administered by its courts, the answer is, in my judgment, at any rate so far as this court is concerned, conclusively provided by the following passage from the judgment of the Privy Council in *Jaber Elias Kotia* v. *Katr Bint Jiryes Nahas*.[5] "In the English courts phrases which refer to the national law of a propositus are prima facie to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country with regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile (if they consider that to

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[1] F. A. Mann, in *Modern Law Review*, 11 (1948), p. 232 (Notes of Cases—'Succession to Immovables Abroad') argues that the point before the court was one of construction of a will made by a domiciled Englishman, which did not therefore involve the question of the *renvoi* at all.

[2] J. H. C. Morris (op. cit., p. 264, at 266) points out that 'the renvoi doctrine has never before been applied to questions of construction, though of course it has been applied to questions of essential validity'.

[3] Because it does not bear on the question of the *renvoi*. But see comments of Morris, op. cit., and Mann, op. cit.

[4] At pp. 513, 514.

[5] [1941] A.C. 403, 413.

be relevant) and having regard to the situation of the property in question (if they consider that to be relevant)".

'The judgment in question was that of a very strong Board, and although it may be urged that so far as the case before the Board was concerned the observation was obiter dictum, it was put forward as a statement of the law of England on this point, and it is supported by an impressive body of judicial authority, of which reference may be made to *Collier* v. *Rivaz*,[1] *Casdagli* v. *Casdagli*,[2] *In re Ross*,[3] and *In re Askew*.'[4]

It will in due course be respectfully demonstrated that the argument thus set out contains a fundamental fallacy. The dictum of the Privy Council that was cited at length was not binding on the learned Judge either conclusively or at all, and in so far as it was 'put forward as a statement of the law of England on this point' it was, it is submitted, unwarrantably so put forward. As for the 'impressive body of judicial authority' relied on as supporting it, it will be shown that the cases cited certainly do not all support it, and that it is even doubtful whether any of them do so.

The learned Judge, it is true, does not overlook the fact that the dictum of the Privy Council was *obiter*. He does, however, omit to observe that a review of the authorities in the English courts was not only unnecessary to the decision of the appeal before the Board, but was wholly irrelevant and even foreign to it. The appeal was from the Supreme Court of Palestine sitting as a Court of Appeal, and the Privy Council were therefore themselves sitting as a Palestinian court, of which the *lex fori* was Palestinian law and no other. English law was, for the purposes of the case, foreign law, requiring proof as such (if they considered it to be relevant). There was, however, no occasion at all for the application of English law, and accordingly the references to it by the Board were wholly gratuitous, and, despite the high standing of the members of the Board, entirely devoid of binding authority.

Again, as to the merits of the dictum itself, and apart from any justification for its pronouncement on the occasion in question, Wynn-Parry J., in claiming that it was supported by, at any rate, three out of the four decisions cited by him, was only following the claim made by the Privy Council in its own judgment. Nevertheless it is respectfully submitted that the claim is not well founded in any of the four instances that were given.

III. *The four basic authorities*

1. *Collier* v. *Rivaz*. *Collier* v. *Rivaz*[1] is generally regarded as the fount and origin of the application in some form of the doctrine of the *renvoi* in English law. A British subject had acquired a domicil, in the English sense, in Belgium. He died in Belgium, leaving a will and six codicils, four of

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[1] (1841), 2 Curt. 855.

[2] [1918] P. 89, 111; [1919] A.C. 145.

[3] [1930] 1 Ch. 377.

[4] [1930] 2 Ch. 259.

which latter were in English form and two in Belgian form. In the eye of the Belgian law, as it stood at the date of his death, he had never lost his domicil of origin. The case was decided by Sir Herbert Jenner (as he then was) in the Prerogative Court of Canterbury. The two codicils in Belgian form were admitted to proof without argument. As to the four remaining codicils, these were also eventually admitted to proof. The process of reasoning was that the English view of the testator's domicil remitted the matter to the Belgian court, which in its turn would be impelled to apply English law to a resident who had not acquired a Belgian domicil.

Superficially, it must be admitted that this result agrees with the dictum of the Privy Council that English courts construe phrases which refer to the national law of a *propositus* as referring 'to the law which the courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile'. More closely observed, however, that is not correctly so. In admitting to probate the two codicils that were in Belgian form and were undisputed, Sir Herbert Jenner was in effect applying what the Privy Council described as 'the law which the courts of that country would apply in the case of its own national domiciled in its own country with regard . . . to property in its own country', being the very thing which, according to the Board, the English courts will not do. At the most, therefore, the case is an authority for the proposition that where the form of a will is in issue, the English courts will apply either the internal *lex domicilii* or the whole of the *lex domicilii* or both, so long as the result is to uphold, wherever possible, the validity of the instrument. There is also the further point that Sir Herbert Jenner, sitting notionally in Brussels, applied English internal law without concerning himself to ascertain whether that was 'the law which the courts of that country would apply to the particular case of the propositus', or whether the English conflict rules should not also have been applied.[1]

2. *Casdagli* v. *Casdagli*. The next amongst the 'impressive body of judicial authority' referred to by Wynn-Parry J. is *Casdagli* v. *Casdagli*.[2] The page-reference in the footnote shows that he had in mind particularly a passage in the dissenting judgment of Scrutton L.J., the conclusion and reasoning of which were approved in the House of Lords. The judgment of the Privy Council already cited[3] expressly refers to the principle stated in their *obiter dictum* (set out at length above) as 'the principle recognized by Scrutton L.J. in *Casdagli* v. *Casdagli* . . .; Luxmoore J. in *In re Ross* . . .; and by Maugham J. in *In re Askew* . . .'.

The passage in *Casdagli* v. *Casdagli*[2] to which reference was made is as follows:

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[1] See Falconbridge, *Conflict of Laws* (1947), pp. 120–3.

[2] [1918] P. 89, 111; [1919] A.C. 145.

[3] [1941] A.C. 403, 413.

> 'Practical and theoretical difficulties arise from the fact that, while England decides questions of status in the event of conflict of laws by the law of the domicil, many foreign countries now determine those questions by the law of the nationality of the person in question. Hence it has been argued that if the country of allegiance looks to or sends back the decision to the law of the domicil, and the country of the domicil looks to or sends back (renvoyer) the decision to the law of nationality, there is an inextricable circle in "the doctrine of the renvoi" and no result is reached. I do not see that this difficulty is insoluble. If the country of nationality applies the law which the country of domicil would apply to such a case if arising in its Courts, it may well apply its own law as to the subject-matter of dispute, being that which the country of domicil would apply, but not that part of it which would remit the matter to the law of domicil, which part would have spent its operation in the first remittance. The knot may be cut in another way, not so logical, if the country of domicil says: "We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects". This is the German solution of the difficulty.'

It will be noted that this dictum affords no support at all to the principle stated by the Privy Council. There is not a word about the law that a foreign court 'would apply to the particular case of the propositus, having regard to what in their view is his domicile' as opposed to the law which the same foreign court 'would apply in the case of its own national domiciled in its own country with regard . . . to property in its own country'. On the contrary, the first alternative of Scrutton L.J. assumes simply that the foreign court, in applying 'its own law as to the subject-matter in dispute', would apply the law of the domicil of the *propositus*, shorn of its conflict rules. The second alternative, falling even wider of the mark, envisages the foreign country candidly applying the law that it would apply to its own subjects. In neither event is any attempt to be made to ascertain what law the foreign court really 'would apply to the particular case of the propositus'.

It is difficult to appreciate in what way the Privy Council found material here from which to extract their principle. *Casdagli* v. *Casdagli*[1] was a divorce suit in which the jurisdiction of the English court was challenged, on the ground of the husband's alleged foreign domicil. The parties were British subjects, held to have acquired an Egyptian domicil; but since at the material time Consular Courts were set up by treaty in Egypt in which cases involving British subjects were dealt with according to English law, it was argued that by reason of extraterritoriality an Englishman residing, however permanently, in Egypt never lost his domicil of origin in favour of an Egyptian domicil. That was the issue; and the ultimate conclusion was summed up by Lord Finlay L.C.[2] in these words:

> 'The position of a British subject in Egypt is not extra-territorial; if resident there, he is subject to the law applicable to persons of his nationality. Whether that law

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[1] [1918] P. 89; [1919] A.C. 145.

[2] [1919] A.C. 145, 156.

owes its existence simply to the decree of the Government of Egypt or to the exercise by His Majesty of the powers conferred on him by treaty is immaterial.'

That is to say, the House of Lords held that *quoad* a British subject, his own internal law was involved, not by virtue of any conflict rules, but as part of the internal law of Egypt itself. Consequently the observations of Scrutton L.J. on the subject of the *renvoi* (to which, as such, no reference was made in the House of Lords) were entirely uncalled for and irrelevant, and technically speaking added nothing to the law on the subject.

3. *In re Ross*. When *In re Ross*[1] (the next of the Privy Council's authorities for their principle) came before Luxmoore J. for decision, no clear-cut principle had yet been judicially settled on which the English court was to act in applying foreign law. Luxmoore J. heard the case on five different days, and, after a lapse of nearly four months, delivered a reserved judgment in which he made an exhaustive review of the authorities which he regarded as bearing upon the point. With the exception, however, of *In re Annesley*[2] (to be discussed later), every case on which he relied either followed or purported to follow *Collier* v. *Rivaz*[3] or was a case in which no conflict of laws in the event arose. He also cited at length the dictum of Scrutton L.J.[4] just discussed above. In these circumstances, it is submitted that Luxmoore J. went beyond what his authorities warranted, in holding[5] as a matter of principle that 'the correct view as laid down by the English decisions' was that 'the English Court is solely concerned to inquire what the Courts of the country of domicil would in fact decide in the particular case', as opposed to applying the foreign internal law or inquiring, as he put it, 'what the Court of the domicil would decide if the propositus, instead of being domiciled in the foreign country, was also a national of that country'.

There was, in addition, a difficulty with which Luxmoore J. did not deal. It was the problem of applying his own principle in the case of a British subject, where the *lex domicilii* (according to the notions of English law) invokes the *lex patriae*. How would a foreign court interpret its conception of 'British law'? It so happened that the *propositus* in *In re Ross*,[1] though domiciled in Italy, was a British national with an English domicil of origin, so that it was convenient to assume that the Italian court would have applied English law.[6] But had he been a Scot or a Maltese or a Canadian from Quebec, the problem would have arisen in a more acute form. The question might then have been whether the *lex patriae* of such a national was ascertainable at all, and whether, in default of its being ascertainable, Italian internal law would not, after all, have had to be applied in his case.[1] Or suppose that the law chosen by the English conflict rule invoked the *lex patriae* (e.g. Scots law) of such a *propositus* in its entirety. A problem of transmission (as opposed to remission) might thus be presented, involving a new 'open offer' being made to the law of Scotland. If that law, in its turn, referred the case again to the *lex domicilii*, there might even be a deadlock.

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[1] [1930] 1 Ch. 377.

[2] [1926] Ch. 692.

[3] (1841), 2 Curt. 855.

[4] [1918] P. 89, 111.

[5] [1930] 1 Ch. 377, 388.

[6] Raymond Jennings, K.C. points out (in *Law Quarterly Review*, 64 (1948), pp. 321, 322) that in *In re Duke of Wellington* [1947] Ch. 506, one of the Spanish experts referring to the 'national law' of a British subject deposed that the Spanish law would undoubtedly regard English law as the national law of the testator, and on this point his evidence was not challenged. On the facts of that case, English law was accordingly imported.

4. *In re Askew.* The last case in the 'impressive body of judicial authority' by which Wynn-Parry J. observed that the *obiter dictum* of the Privy Council was supported is *In re Askew*.[2] The question there was whether a child born out of wedlock during the first marriage of a father who was a British subject domiciled in Germany, and who subsequently married the mother, was or was not to be deemed to have been legitimated by such marriage. If English internal law applied, she was not legitimated; but it was otherwise if German internal law applied. Maugham J. (as he then was) held that the *propositus* was duly legitimated.

In order to follow attentively the process of reasoning by which this result was arrived at, it is best to begin at the conclusion and trace back the argument to its source. According to the evidence of the expert in German law, 'accepted by all parties as correct':[3]

> 'The rule followed by the German Court is that both the municipal law and the rules of international law, as interpreted by the English Court, are to be applied. The German Court therefore accepts the renvoi. There is no general statutory rule of German law as to which municipal law in the case of renvoi as in the present case is to be ultimately applied. The question has however been decided by numerous decisions of the Reichsgericht, the Court of the highest instance in Germany. . . . These decisions are to the effect that in a case where the German law provides that the law of the nationality is to govern a question and the law of nationality refers to the law of domicil and the domicil is German, the German Court is to apply German municipal law.'

This bears a strong resemblance to the 'open offer' formula. At any rate it postulates a case where, by virtue of the *renvoi*, an offer would be made, consequent upon which internal law would eventually be applied. Yet, although Maugham J. did, on the strength of it, apply German internal law, he did so simply on the facts of the case (that is to say, the evidence as to what 'the lex domicilii in the wide sense' was), and not because as a matter of law he gave the least countenance to the 'open offer' formula or any other application of the *renvoi*. On the contrary, he said expressly,[4] '. . . I am not aware of any satisfactory definition of the term renvoi; but it will be noted that, if I am right, an English Court can never have anything to do with it, except so far as foreign experts may expound the doctrine as being part of the lex domicilii.'

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[1] See Falconbridge, op. cit., chap. 9, § 4, p. 201.

[2] [1930] 2 Ch. 259.

[3] Ibid., at pp. 276, 277.

[4] Ibid., at p. 268.

IV. *The theory of 'acquired rights'*

It remains, therefore, to be considered on what principle Maugham J. was prepared to apply the *lex domicilii.* For in a case where that law might not conveniently solve the problem as a theoretical matter of fact, the result could possibly have been quite different. The principle was stated by the learned Judge[1] with some elaboration. Put shortly, he expounded the theory of 'acquired rights'. Having assumed that John Doe, a British subject, had acquired a domicil in the English sense in Utopia, according, however, to the law of which his personal law was that of his nationality, and that some matter affecting his status or capacity or the succession to his surplus assets had been raised in an English court, he tested the matter by examining the approach which that court would make to the problem.

> 'Like others before me', he said,[2] 'I have spoken of the lex domicilii as applying to John Doe; but it should not be forgotten that the English Court is not applying Utopian law *as such*, and the phrase is really a short way of referring to rights acquired under the lex domicilii. The inquiry which the Court makes is, of course, as to Utopian law as a fact, and one to be proved in evidence like any other. The inquiry might accurately be expanded thus: What rights have been acquired in Utopia by the parties to the English suit by reason of the de facto domicil of John Doe in Utopia? For the English Court will enforce these rights, though, I repeat, it does not, properly speaking, enforce Utopian laws. It is evident that, so stated, the question involves this. Have the parties acquired rights in Utopia by reason of the personal law of John Doe being English local law or Utopian local law? There is this alternative and no other. It is apparent that there is no room here for a deadlock, and that the circulus inextricabilis is no better than a (perhaps amusing) quibble.'

The basis of this reasoning is that an 'acquired right' is something as objective if not as tangible as movable property, something that has become attached to its owner as against all the world. But is this so? Is the right in question any more than what the *propositus* could count on enforcing in the court of his domicil on the hypothesis that he resorted to that court? If in truth it is more, if indeed this hypothetical enjoyment is something that in the eye of English law belongs to him always and everywhere so long as he maintains his domicil, there seems to be no logical ground on which to exclude rights acquired under a polygamous or incestuous marriage recognized by the law of his domicil (though perhaps contracted in England), or rights flowing from the operation of some limitation statute operative in the courts of his domicil, though regarded as purely procedural in English law. This must follow because the English court, according to the theory under consideration, will not be applying foreign law as such, but only the rights acquired under that law.[1] The English court is not therefore concerned, and should not indeed presume, to inquire by what legal steps those rights (which are simply facts) have been acquired.

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[1] [1930] 2 Ch. at pp. 265–8.

[2] Ibid., at p. 267.

In *In re Askew*[2] Maugham J. was not, it is true, confronted with so extreme an example as this. But even so, it may respectfully be doubted whether he found it possible to apply his own principle logically. The rights which he found Fräulein Askew to have acquired were the rights and all the rights enjoyed by a German national according to the whole German law. But she enjoyed those rights precisely because she was a British subject, and because the German law gave her the privilege of enjoying personally the law of her own nationality, which it assumed conferred on her the right (thus and thus only acquired) of being treated as though she were in all respects a German! Here is a hall of distorting mirrors indeed, when the English court finds itself enforcing rights founded upon a patent misconception of the English law!

There are indeed two such misconceptions. The first is that upon any accepted principle of English law the *lex domicilii* is for a British subject the internal law which the country of the domicil applies to its own domiciled nationals. The second is that which has already been discussed, that the 'national' law of a British subject as such is not English law any more than it is Scots law. As it happens, Sir Frederick Pollock, then editor of the Law Reports, went out of his way to append a footnote to *In re Askew*[2] on this very point. In connexion with the reference by Maugham J. to a case in which it was held that the law of nationality of a British subject, whose domicil of origin was Malta, was 'according to the law of England' Maltese law, Sir Frederick wrote:

> 'A compendious name for the legal result of allegiance to His Britannic Majesty: there is no suggestion in the present case of any presumption that a British subject's personal law is that of England rather than any other part of the Empire. Such a suggestion has been made elsewhere, but, it is submitted, without foundation.'[3]

That negative method of dismissing the difficulty does not, however, dispose of it. The question is not what presumption the English court will or will not make, but what, as a fact,[4] is the law which the particular foreign court will apply as the *lex patriae* of a British subject. It may well be that in some cases there is as yet no authoritative answer to that question; and the result will then be that if rights have been acquired, they are unascertainable.

It should now be observed that the theory of 'acquired rights', which lies at the very foundation of the decision in *In re Askew*,[1] finds no place at all in the dictum of the Privy Council by which Wynn-Parry J. considered himself bound, and which professes to draw support from *In re Askew*,[1] as from other cases already discussed. Once more it reads:[2] 'In the English courts phrases which refer to the national law of a propositus' (not, of course, his *lex patriae*, but the foreign law indicated according to the English conflict rules) 'are prima facie to be construed . . .. as referring . . . to the law which the courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant)'. On the basis of the theory of 'acquired rights', the appropriate words would have been, 'construed . . . as referring . . . to the rights acquired pursuant to the law which the courts of that country would apply to the particular case of the propositus'. All the rest would be surplusage that could serve no other purpose than to limit the extent of the enforceable rights. As Maugham J. put it:[3] 'The English Court has to decide a matter within its jurisdiction according to English law in the wide sense, and if the matter depends on foreign domicil it is only necessary to prove certain facts as to rights under the foreign law.'

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[1] See Falconbridge, op. cit., ch. 2, § 2 (2).

[2] [1930] 2 Ch. 259.

[3] Ibid., at p. 269.

[4] See Note in *Law Quarterly Review*, 64 (1948), pp. 321, 322.

Nevertheless, to that apparently comprehensive direction as to the necessary evidence to which the English law will be applied, Maugham J. added something within which may lurk a serious inconsistency. 'It is therefore, I think, clear', he proceeded, 'that, when we inquire whether John Doe has acquired rights in Utopia by Utopian law, we must mean by the whole of the laws of Utopia, including any views of private international law which may be deemed to give him rights (or subject him to restrictions), though an Englishman settled in that land.' Taken at its face value, this sentence adds a mere gloss on the expression 'foreign law', making it clear exactly what it is that calls for proof in ascertaining the rights. But if the two sentences quoted are carefully read together, the joint effect is that the English court must apply 'English law in the wide sense' and in so doing must import whatever rights are acquired under 'the whole of the laws of Utopia'. Maugham J. was fortunate in having before him a case in which the foreign law had a conflict rule by which on a reference back from the law prima facie applicable, its own internal law was brought into untrammelled operation. But had this been otherwise, had the conflict rules of the foreign law remained unaffected by references back, the 'personal law of John Doe' would have been neither 'English local law' nor 'Utopian local law' (the only possible alternatives allowed by Maugham J.); and without resorting to the 'open offer' formula or to some like device, what escape would there then have been from the derided *circulus inextricabilis*?

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[1] [1930] 2 Ch. 259.

[2] [1947] A.C. 403, 413.

[3] [1930] 2 Ch. 259, 267.

But the learned Judge was not content to found his decision, as he did unequivocally, on the theory of 'acquired rights'. Having explained and applied that theory, he then proceeded to support his decision by professing to follow authorities in which that theory was not even referred to, and with which it is hard to reconcile. The dictum of Scrutton L.J. in *Casdagli* v. *Casdagli*,[1] the want of binding authority in which had now been eradicated by repeated reliance upon it, was once more prayed in aid, even though, in flat contradiction to the view expressed by Maugham J. himself, it recognized the *renvoi* and proposed two alternative devices for escaping from its logical dilemma. The decision of Russell J. in *In re Annesley*[2] was sympathetically examined. Finally *In re Ross*[3] was in substance followed.

It is the qualification which Maugham J. made with regard to this last decision that is particularly remarkable. Granted that Luxmoore J. meant to decide that in an appropriate case it was the duty of the English court to apply foreign law as such and not merely rights acquired under foreign law, and that Maugham J. would naturally wish to dissent from that view, yet what was actually said[4] was as follows:

> 'I do not think an English Court administering the estate of a British national in this country is bound to follow the decisions of all foreign Courts, however erroneous or unreasonable. I am not convinced that an English Court is bound to accept all the views of a foreign Court on the rules of private international law, where they plainly conflict with our notions of comity.'

Then, after giving examples of repugnancy in hypothetical foreign laws, he proceeds:

> 'It is one thing to hold that the law of England requires that the movables of a British subject who dies domiciled in a foreign country shall be administered in accordance with the law which that country would apply to its own nationals, and another to hold that our law in all cases requires his movables to be administered as the law of that country requires in the case of foreigners. In my opinion the safer view is that an English Court in deciding a question arising here as to the administration of the movables of an Englishman who has died abroad, or as to the status of such a person, is deciding a question of English law in the wide sense, which may no doubt include or involve in a particular case the consideration of foreign views on private international law, but allows us a certain power of discrimination in the application of them. As Scrutton L.J. remarked in *Casdagli* v. *Casdagli*[1] the lex domicilii must be one which our Courts will recognize.'

So much for acquired rights. On the basis that, for better or for worse, they attach as a species of property in consequence of the acquisition of a foreign domicil, it is at least intelligible that a British national should be treated as having acquired the right to be treated as a German in Germany because the German law chooses to say that that is the effect of English law. But once reserve the right to go behind the law of the domicil and modify its effects if it seems objectionable, then whatever the English court is applying, it will not be the acquired rights. If it merely professes to be applying foreign law, a certain discrimination on grounds of public policy can again be well understood. But rights are either acquired or they are not. So far as they are dependent on foreign law, they are facts; and the law on which they are dependent is no more than the evidence by which they can be ascertained. Public policy does not enter into the question.

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[1] [1918] P. 89, 111.

[2] [1926] Ch. 692.

[3] [1930] 1 Ch. 377.

[4] [1930] 2 Ch. 259, 275.

V. *Evolution of the 'open offer' formula*

Whatever else, then, may be said of *In re Askew*,[1] it is difficult to see how it can be justified as lending support to the dictum of the Privy Council in *Jaber Elias Kotia* v. *Katr Bint Jiryes Nahas*[2] or as justifying either the conclusions of Wynn-Parry J. or the reasoning upon which he arrived at them in *In re Duke of Wellington*.[3]

Yet in spite of everything, Wynn-Parry J. considered himself bound by authority not only to recognize the *renvoi* but without hesitation to apply the 'open offer' formula. No doubt his mind was very much influenced by his reading (shared by many distinguished predecessors) of *Collier* v. *Rivaz*.[4] But one may hazard the guess that what guided him more than anything else was the course taken in *In re Annesley*,[5] a case that was cited to him in argument, although he did not mention it in his judgment. It was a decision of Russell J., who incidentally as Lord Russell of Killowen was afterwards a member of the Board which decided *Jaber Elias Kotia* v. *Katr Bint Jiryes Nahas*[6] in the Privy Council. The main value of the case is that it is a clear-cut decision upon the question of the choice of law in the first place. There had previously been some doubt on this point where the *propositus* was, according to English conflict rules, domiciled in a foreign country by the conflict rules of which no such domicil could be recognized.[7] Russell J. held that the English conflict rules prevailed in such a case. That, however, raised the question of how the uncooperative *lex domicilii* was in such event to be applied; and it is at this point that a certain looseness appears in the reasoning of the learned Judge.

The material passage in the judgment[8] is as follows:

> 'I accordingly decide that the domicil of the testatrix at the time of her death was

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[1] [1930] 2 Ch. 259.
[2] [1941] A.C. 403, 413.
[3] [1947] Ch. 506.
[4] (1841), 2 Curt. 855.
[5] [1926] 1 Ch. 692.
[6] [1941] A.C. 403.
[7] *In re Johnson*, [1903] 1 Ch. 821; *In re Bowes*, 22 T.L.R. 711; *Hamilton* v. *Dallas*, 1 Ch. D. 257, 260; and of *Anderson* v. *Laneuville* (1854) 9 Moo. P.C. 325, 335; *Abd-Ul-Messih* v. *Farra*, 13 A.C. 431, 439.
[8] [1926] 1 Ch. 692, 706.

French. French law accordingly applies, but the question remains: what French law? According to French municipal [*sic*] law, the law applicable in the case of a foreigner not legally domiciled in France is the law of that person's nationality, in this case British. But the law of that nationality [*sic*] refers the question back to French law, the law of the domicil; and the question arises, will the French law accept this reference back, or renvoi, and apply French municipal law?'

Allowing, as is evident from the context, that the first reference to 'French municipal law' was a slip, and that what was intended was a reference to the French conflict rules, and passing over the assumption (already discussed) that the law of a person of British nationality is English law, difficulties yet remain. To ask the question 'What French law?' and thereupon to resort (albeit inaccurately) to a French law by which 'the law of that person's nationality' is indicated, is plainly to beg the question asked. In *Collier* v. *Rivaz*,[1] Sir H. Jenner seems to have asked himself no such question. He simply accepted the evidence of expert witnesses that a court seised of the case in Belgium would have applied the Belgian conflict rules. Perhaps it is to be inferred from the references in the judgment of Russell J. to differences of opinion amongst the expert witnesses in *In re Annesley*[2] as to the French view of the *renvoi*, that he had similar evidence regarding the course which a French court would have taken. But that merely leaves the issue confused. The question 'What French law?' does not strictly mean what French law will the French courts apply, for any national court seised of a cause would prima facie be presumed to apply the whole of its law without distinction. The real meaning of the question is what French law the English court is bound by English conflict rules to apply.

In *Collier* v. *Rivaz*[1] the English court applied or purported to apply the whole Belgian law, apparently for no better reason than that Sir H. Jenner, having postulated the fiction of adjourning his court to Brussels (apparently because he doubted whether otherwise he had jurisdiction; cf. his previous judgment in *de Bonneval* v. *de Bonneval*[3]), saw no occasion for applying less than the whole law. But apart from the grudging alternative ground of the discredited decision of Farwell J. in *In re Johnson*[4] (a decision which in the course of the very judgment now under discussion Russell J. expressly declined to follow), there is no other reported case before *In re Annesley*[2] in which the English court has taken upon itself to apply a foreign law, whether directly or by analogy, the conflict rules of which have been proved to conflict with English law. There was, it is true, the dictum of Scrutton L.J. in *Casdagli* v. *Casdagli*,[5] the force of which has already been discussed; but even that pronouncement merely predicated a case in which the law of the domicil might send back the decision to the law of the nationality, without necessarily laying it down that English law would always invoke the *lex domicilii* in that sense. No doubt, however, there was a strong implication to that effect, and it seems probable enough that Russell J. had that dictum in mind when arriving so readily at the assumption that English law would as a matter of course apply the whole foreign law in the first instance.

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[1] (1841), 2 Curt. 855.

[2] [1926] 1 Ch. 692.

[3] (1838), 1 Curt. 856.

[4] [1903] 1 Ch. 821.

[5] [1918] P. 89, 111.

In so assuming (whether justifiably or not), Russell J. had really answered his question 'What French law?', for from that point onwards the question became purely one of fact, and as such outside the bounds of legal discussion in the English court. Although it strongly appears as though Russell J. in putting his question actually had in mind the final result and not just the intermediate step that brought the *lex domicilii* into operation, like Sir Herbert Jenner before him, he arrived at his conclusion on the evidence of experts as to how the foreign court would itself determine the case. There is no significance in the distinction that in *Collier* v. *Rivaz*[1] English internal law was eventually applied whereas in *In re Annesley* it was French internal law which prevailed. As between those two decisions there was no difference of principle. As Belgian law was proved to have stood in 1841, the application of the personal law of the *propositus* meant the application of his internal national law. As French law was found to stand in 1926, a reference back from the personal law (from the French point of view) of a *propositus* domiciled *de facto* in France admits the application of French internal law.

Also in line with these authorities on the point is the decision of Crossman J. in *In re O'Keefe*.[2] A British subject of Southern Irish origin died intestate in Italy, where she had acquired a domicil of choice. The result of the expert evidence as to Italian law was (as in the case of *In re Ross*[3]), that the national law of the *propositus* governed such a case. It does not clearly appear from the Reports that this was proved to mean the national internal law, but it is implicit in the judgment that the evidence was so understood and accepted. The case raised in an acute form the question as to what was the 'national' law of a British subject of Southern Irish origin. But that, being a point of Italian law (so far as *In re O'Keefe*[2] was concerned), was technically one of fact, and, whether in the event rightly or wrongly determined, still left the main principle of the decision unaffected. The Judge first turned to the *lex domicilii* in its entirety in accordance with the English conflict rules. He then heard evidence as to what an Italian court would do in such a case, and having found as a fact that that court would apply the law of Eire as the 'national' law of the *propositus* (which he interpreted as 'the law of Eire applicable to a person dying intestate domiciled in Eire'),[4] determined accordingly.

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[1] (1841), 2 Curt. 855.

[2] [1940] Ch. 124.

[3] [1930] 1 Ch. 377.

[4] [1940] Ch. 124, 130.

Looking back upon the four modern cases that preceded *In re Duke of Wellington*,[1] the evolution of a consistent principle can be observed. In each of them the first step was to apply the English conflict rule in making the choice of law; and in each, the foreign law having been chosen and examined in its entirety, the evidence as to how the foreign court would apply that law governed the result. In *In re Annesley*,[2] the witnesses convinced the court that a French court, while disclaiming jurisdiction in the first instance, would nevertheless apply French internal law if the law indicated by the French conflict rules referred back the decision. This was called, for want of a better name, 'accepting the renvoi'. In *In re Askew*,[3] the evidence as to German law showed that in like circumstances that law would also accept the *renvoi*. Both *In re Ross*[4] and *In re O'Keefe*[5] raised a similar question of fact in relation to Italian law. In those cases the evidence was that the law chosen by the English conflict rules would not accept the *renvoi*. The resulting repercussions of this evidence on these successive problems was the development of the 'open offer' formula; for in whatever form it was put, the substantive question for the English court was always whether or not the foreign court would in the end apply its own internal law.

By the time Wynn-Parry J. came to decide *In re Duke of Wellington*[1] in 1947, the formula had almost come to be taken for granted. The application after the due choice of law of 'the whole of the law of Spain, including therein the body of rules of private international law recognized and administered by its courts'[6] appeared, as has been seen, to the learned Judge 'to present no difficulty'. Having indicated the authority that he professed to follow (with what justification has now been discussed), he directed himself thus[7] as to the next step:

> 'It is at this point that the real difficulty on this part of the matter arises. What is the law which would be applied by the Spanish Court, if on the facts which I have stated, the questions as to the devolution of the Spanish property which I have to decide, were being decided by that court? As will emerge later in this judgment, the question comes down to this: does Spanish law recognize and apply the doctrine of renvoi? It is not a difficult question to state, but it is not easy to answer.'[8]

The difficulties attending the answer are of no particular moment for the present purposes. They depended upon the weighing of the available expert evidence, and, from the viewpoint of the English court, were pure matters of fact. What is important is the adoption, as a matter of English law, of the principle that notwithstanding the choice of law according to the English conflict rules, such choice was really no more than an offer, the ultimate result depending on whether or not the chosen law recognized and applied the doctrine of the *renvoi*.

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[1] [1947] Ch. 506.

[2] [1926] 1 Ch. 692.

[3] [1930] 2 Ch. 259.

[4] [1930] 1 Ch. 377.

[5] [1940] Ch. 124.

[6] Ibid., at p. 513.

[7] Ibid., at p. 514.

[8] 'Once he had decided that Spanish "law" meant Spanish rules of the conflict of laws, the learned judge's difficulties began'; *per* J. H. C. Morris (op. cit., p. 264) who is impressed by Lorenzen's conviction that sooner or later the English higher courts will not hesitate to reject the decisions of the courts that have lent colour to *renvoi* in English law as unsound in theory.

The manner in which the learned Judge regarded it as his duty to approach his task was clearly put[1] in the following passage:

> 'The task of an English judge, who is faced with the duty of finding as a fact what is the relevant foreign law, in a case involving the application of foreign law, as it would be expounded in the foreign court, for that purpose notionally sitting in that court, is frequently a hard one. . . .'

From the context it appears that what Wynn-Parry J. was referring to as the 'relevant law' in that case was not the internal law of Spain governing succession to immovables, but the Spanish conflict rules. For this was the law which determined the question, 'not . . . difficult . . . to state, but . . . not easy to answer', whether the Spanish law recognized and applied the doctrine of *renvoi*. His ultimate conclusion was[2] thus expressed:

> 'Basing myself on this material, I come to the conclusion that it would be against the spirit and intendment of the Spanish Civil Code to hold that, in a case such as this, Spanish law would accept the renvoi which the English law makes to it as the lex situs. I therefore hold that, according to Spanish law, the questions raised by this summons as to the devolution of the immovable property in Spain of the testator must be resolved by reference to English law.'[3]

Here is the plainest possible application of the formula: 'the renvoi which the English law makes' (i.e. by way of offering to apply the internal law shorn of the reflexive conflict rules) 'to it as the lex situs', which on the facts it appears Spanish law (in its entirety) would not 'accept'; and therefore (note 'therefore'), 'according to Spanish law' (again note), 'the questions . . . must be resolved by reference to English law' (meaning English internal law). There is the offer, open to acceptance or rejection; and there is the ultimate application of the foreign internal law or the English internal law according to whether the English judge finds as a fact that the foreign court would accept or reject the offer.

As has already been observed, the formula is based upon the doctrine that the English conflict rules, in choosing a foreign law, thereby import the foreign conflict rules; and that doctrine rests at present upon the authority of a gratuitous pronouncement on English law made by the Privy Council sitting as a Palestinian court, and professing to be supported by a line of authorities which, when critically examined, either fail altogether to bear out the doctrine, or themselves rest on insecure foundations. Yet, for all this flaw at its root, the formula owes its ancestry to a very formidable array of eminent judges, and (what is perhaps even more important), unless and until an English judge is compelled on the evidence before him to find that the chosen foreign law itself applies the corresponding formula, it is bound to lead to an ascertainable result.

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[1] [1947] Ch. 506, 515.

[2] Ibid., at p. 521.

[3] But see Note by Mann ('Succession to Immovables Abroad') in *Modern Law Review*, 11 (1948), p. 232, where he points out that it is strange that the judge should have come to the conclusion that Spanish law would not accept the *renvoi* based on the evidence of an expert witness who relied on the writings of Professor Trias de Bes, according to whom (*Hague Receuil*, 31 (1930), pp. 663–5) Spanish law recognizes and accepts the doctrine of the *renvoi*.

VI. *The formula and legal theory*

It is magnificent. But is it law? To a legal theorist this is an embarrassing question. Nothing that cannot be justified either on principle or by sound precedent can properly be admitted as good law, however distinguished its authorship or expedient its practice. If then the formula is to be frowned upon as a judicial abortion, what have the theorists to offer in its place? Regarded *a priori* the problem is to find a juristic solution to the deadlock that arises when the conflict rules of two systems of law each point to the other system. All writers are agreed upon this, that at some stage (if not at the very outset) the process of mutual reflection must be arrested, and arrested upon grounds that can be supported on some basis of sound reason or at least of expediency. They seem also to be agreed that the machinery of arrest is to be constructed out of a fission of any given system of law into internal law and conflict rules. The basis of difference between them was thus expressed by Griswold in a review of Mendelssohn-Bartholdy's 'Renvoi in Modern English Law':[1]

> 'The conflict is between the desire for a simple, clear rule on the one hand, thought to be achieved by applying invariably the conflicts rule of the forum, and the desire, on the other hand, to eliminate ultimate conflicts by finding a means of deciding the same controversy the same way regardless of the forum in which it arises.'

The advocates of the 'simple, clear rule' ranged themselves in the camp that opposed the *renvoi* on principle, for in referring to 'the conflicts rule of the forum' a supposed rule was presumably meant whereby the internal law of the chosen foreign country was to be applied as it would apply to a domiciled national of that country. Those, on the other hand, whose aim was to ensure uniformity of result, whatever forum should happen to be seised of the case, were obliged to accept some theory of the *renvoi*.

The anti-*renvoi* school, which counts amongst its chief exponents Lorenzen and Cheshire as well as the majority of both judges and jurists in the United States, which finds support in general from the Institute of International Law, including the majority of the most eminent French jurists (as opposed to the general trend of the Cour de Cassation), and which receives qualified support from Falconbridge, puts forward as its main point of criticism that when logically applied the *renvoi* reduces itself to an absurdity, whereas on any other basis it is wholly indefensible. It cannot, so it is argued, be justified even on the basis that it secures uniformity of decision, for the courts of country A professing to apply the law of country B will not necessarily do so as the courts of country B would actually have done (see the difficulties that perplexed Wynn-Parry J. on this point in *In re Duke of Wellington*),[1] and will certainly not do so where differences of procedure or of public policy affecting the result are involved. It is further urged, more particularly by Cheshire,[2] that for an English court in effect to abrogate its own conflict rules in deference to those of a foreign state that insists on applying English law where *ex hypothesi* English law does not apply, is to carry the comity of nations beyond the bounds of reason. Abbot ('Is the Renvoi a part of the Common Law?'[3]) puts the same proposition more positively. He argues that it would be so illogical for the 'court of the situs', having exercised the right to select the appropriate law, to entertain a second and inconsistent selection thereafter, that the law once and for all selected must (as a matter of logical deduction and not merely of comity or convenience) be the internal foreign law only. To Schreiber again,[4] the whole doctrine of the *renvoi* seemed misconceived. The cases usually regarded as applying it were, he considered, when closely examined, either decided on some other principle or were contrary to sound reasoning. Every argument for not applying the foreign law indicated by the conflict rules of the forum applied with equal logic to the *lex fori* itself; whereas to apply the *lex fori* simply in the absence of any other law was (as Cheshire maintains) to make that law untrue to its own conflict rules and therefore to itself. It would also have the consequence of making the result of each case depend arbitrarily on the chance of which forum was originally chosen. That result, moreover, might well accord neither with the law of the domicil of the *propositus* nor with that of his nationality.

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[1] In *Harvard Law Review*, 51, pp. 573, 574.

In common with most of the American writers, Cook[5] finds it possible to explain away cases that are apparently based on an application of the *renvoi* and attacks the theory in principle. But an exception is generally allowed in the case of title to land, including the classification of interests in things according to the *lex rei sitae*. *The Conflict of Laws Restatement*[6] allows a further exception in favour of 'questions concerning the validity of a decree of divorce', though the conflict so raised is rather one of jurisdiction than of choice of law. Falconbridge,[1] though considering that 'it would appear that the controversy has passed beyond the stage in which the doctrine can be either wholly rejected or wholly accepted on supposedly logical and other grounds', is in favour of rejecting the doctrine apart from certain exceptional classes of cases. In particular, he points out that even in England the application of the doctrine has been usually confined to cases involving the *lex domicilii* as such, and that in other cases the English courts have been inclined 'to assume that a reference to a foreign law means a reference to the domestic rules of that law'.[2] Indeed, as he shows, the older cases are still further limited to the law of the domicil in its relation to the formalities of making of a will.[3]

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[1] [1947] Ch. 506.

[2] *Private International Law*, 3rd ed., p. 93: 'If Italian Private International Law remits the question to English Law because it believes that X's national law is more appropriate, and if the English judge accepts the remission and applies the rules contained in the Administration of Estates Act, the inescapable conclusion is that a preference has been shown for the Italian selective rule. English Private International Law has been amended because it does not meet with the approval of the lawmaker in Italy. This is indeed the apotheosis of comity.'

[3] (1908), 24 L.Q.R. 133, 141.

[4] See *Harvard Law Review*, 31, p. 523.

[5] *Logical and Legal Bases of the Conflict of Laws* (1942), pp. 246–8, 439–40.

[6] § 8.

Even the English judges, when applying the 'open offer' formula on one ground or another, have at times expressed *obiter* their misgivings as to where the doctrine of the *renvoi* was leading them. The two classical passages are that of Russell J. in *In re Annesley*[4] and that of Maugham J. in *In re Askew*.[5]

In the former, Russell J. said:

> 'Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of renvoi need be encountered at all. When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the propositus, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicil, while the law of the country of domicil in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogates' Court of New York.'

Four years later, Maugham J., with these observations of Russell J. in mind, said:

> 'I cannot refrain from expressing the opinion that it is desirable that the position of British subjects who acquire domiciles in countries which do not agree with our views as to the effect of a foreign domicil should be made clear by a very short statute. There is much to be said for the "simple and rational solution" suggested by Russell J. in *In re Annesley*;[4] but whether the municipal law of the foreign country or the municipal law of England is to be held applicable in British Courts in these cases, it is clearly

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[1] Falconbridge, op. cit., p. 158.

[2] Ibid., at pp. 177–9.

[3] Ibid., at p. 177.

[4] [1926] Ch. 692, 708.

[5] [1930] 2 Ch. 259, 278.

desirable that the matter should be certain and should not be held ultimately to depend on the doubtful and conflicting evidence of foreign experts.'

It will be observed that neither of these objections is made on principle to the juristic soundness of any theory. In each case the objection is offered as a practical way out of a theoretical difficulty. In the one instance it is deplored that it seems no longer possible by judicial decision so to shape the law as to avoid 'that endless oscillation'. In the other it is proposed that legislation should be resorted to in order to escape the uncertainties resulting from a decision depending upon the ascertainment of foreign law as a fact.

Whether even a legislative solution would be effective is debatable. The Germans have attempted it by the provisions of their *Einführungsgesetz* (Introductory Code to the German Civil Code), which came into force on 1 January 1900, and the effect of which was to apply German internal law where, in the appropriate cases such law was, by the law of a foreign state, declared to be applicable. It was left to subsequent judicial decisions to determine that that applied equally whether the foreign law declared the whole German law (*Recht*) or only German internal law (*Gesetze*) to be applicable, as appears from the evidence which was given in *In re Askew*.[1] Furthermore, it leaves unprovided for the cases which occurred where, by a Decree of November 1941 made under the Reich Citizenship Law, the law of the then German Reich rendered persons stateless, some of whom, in the eyes of English law, were still domiciled in Germany.[2] Would the English court in such a case consider itself bound to apply German law on the strength of the *Einführungsgesetz*, whereby German internal law attaches by virtue of the English conflict rule? Or would the English court have to apply German law on the strength of the Decree of November 1941, whereby German internal law has no further application to the *propositus* who is entirely disowned? Even if the 'very short statute' which Maugham J. envisaged were simply to provide that an Englishman domiciled abroad was to be treated as a national of his domicil there domiciled would be treated in the courts of that domicil, anomalies would be almost inevitable. Both in the case just referred to of the person rendered stateless by the country of his domicil (where his nationality governs his personal law), and in the case where that country applies to foreigners a different law from that which it applies to its own nationals, the English court would find itself applying a perfectly different law from that which the court of the domicil would have applied, notwithstanding that by English statute the latter is the law that the English court would be intended to apply. Nor would such a statute necessarily save the matter from ultimately depending on 'the doubtful and conflicting evidence of foreign experts'.

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[1] [1930] 2 Ch. 259, 276, 277.

[2] See *In re Cohn*, [1945] Ch. 5.

Consequently the search continues for a formula which will ensure, as far as is humanly attainable, that the same case will be decided in the same way, whatever may happen to be the choice of forum. Not only so, but such a formula having been devised, intellectual honesty will not be satisfied unless and until it can be justified either on principle or by precedent soundly based upon good principle. Thus it is that when the outright rejection of the *renvoi* is seen to close the door upon any such formula, great juristic minds turn again to some theory of the *renvoi* in the hope, and sometimes the belief, that a justifiable solution may yet be found. Inevitably they are faced with three limitations: (1) at some point the process of oscillation must be arrested; (2) there must be a cogent reason why it should be arrested precisely at that point; and (3) the theory must in practice result in uniformity of decision in all civilized countries. So far as English law is concerned, it is also necessary to accept, distinguish, explain, or excuse the decided cases. There is therefore plenty of scope for wide differences of opinion.

Dicey (and Keith, the learned editor of the fifth edition[1] of his *Conflict of Laws*) accepted the 'open offer' formula as an accomplished fact. Although in the note in the Appendix to Dicey's *Conflict of Laws*, 5th ed., they professed only to insist that the English courts 'do virtually accept the doctrine of the renvoi' in the sense that they defined (i.e. by applying the formula), and to show how the doctrine 'can be and generally is applied by an English Court to a given case', they were careful to add: 'With the inquiry whether English Courts act wisely or unwisely, logically or illogically, in accepting the doctrine of the renvoi, we have, in this note, no concern whatever.' They did, however, allow themselves[2] the following appreciation:

> 'In truth, the acceptance of the doctrine of renvoi by English Courts is most intimately connected with their theories as to jurisdiction. Once admit that the Courts of a particular country, e.g. Italy, have primary jurisdiction over a particular case, and it almost inevitably follows that when the Courts of any other country, e.g. England, are called upon to determine such a case, they must try to decide it as an Italian Court would decide it; but if an English Court has to decide a case as if it were sitting in Italy, it follows that the English Court must take account of the whole law of Italy, including Italian rules of the conflict of laws.'

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[1] Since this article was written, the sixth edition of Dicey's *Conflict of Laws* has appeared. Everything which was said about the *renvoi* in the fifth edition has been discarded and the entire theory and practice relating to the problem has been elaborately analysed in a section written by Morris (pp. 47–61) in which the conclusion reached is summarized (at p. 56) in the two following sentences: 'Much of the discussion of the renvoi doctrine has proceeded on the basis that the choice lies in all cases between its absolute acceptance and its absolute rejection. The truth would appear to be that in some situations the doctrine is convenient and promotes justice, and that in other situations the doctrine is inconvenient and ought to be rejected.' It is also emphasized that the theory has never been applied outside the field of succession and personal status, and any extension of its application would seem to be deprecated (pp. 55–6, 55 n., 96, 581, n. 12, 690, n. 12).

[2] Dicey, *Conflict of Laws*, 5th ed., p. 869.

As to the argument that there would arise 'a sort of game of legal battledore and shuttlecock', Dicey and Keith had[1] simply this to say:

> 'The plausibility of this paradox arises from the omission to consider that all that an English Judge needs to do is to ascertain as a matter of fact what is the law of Italy with regard to the movables of a deceased person in the position of D., and then deal exactly as an Italian Judge sitting in an Italian Court would deal with them.'

The escape which that line of argument affords is by translating the issue from one of legal consequence to one of ascertainment of fact. Provided that the evidence in each several case establishes a prescribed conclusion at which the foreign judge would have to arrive, the English judge is not further concerned or even entitled to look behind that evidence to see whether that conclusion is soundly based in law. This is in fact the mechanism of the 'open offer' formula.

Although by now his theory can practically be regarded as out of date, it is perhaps still material to notice that Westlake applied the *renvoi* on a different principle. Following von Bar, he developed the doctrine of disclaimer[2] or (as it is more usually called)[3] *désistement*, that is to say, the notional abrogation of jurisdiction by a foreign court on the principle that its internal law made no provision for a case which its conflict rules referred elsewhere. Consequently, the English court was left to apply English internal law by default. Here again there is a species of 'open offer' by the English court. But there is this difference. According to the 'open offer' formula, the foreign law in question has to be fully ascertained, and if in the end English internal law is applied, that is because the foreign law has been found as a fact to choose English law in preference to its own internal law or the law of any other country. By the doctrine of *désistement*, however, a presumption is raised which puts the foreign law finally and completely out of court from the moment that it appears to have a conflict rule inconsistent with dealing with the case of the *propositus* according to its own internal law.

Of the many criticisms[4] by which this theory has been attacked, it is only necessary here to refer to two. First, that it does not follow that if the jurisdiction of the foreign court had actually, and not merely fictitiously, been invoked, that court would have declined to hear and determine the case: and secondly, that it excludes altogether the possibility of a transmission or redirection (*Weiterverweisung*) which the foreign court might make to what may be the really appropriate law of a third country. In either event the whole object of the doctrine of the *renvoi* would be defeated; for the accidental choice of an English forum would produce a different result from that which would have followed from the choice of another forum.

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[1] Dicey, *Conflict of Laws* (5th ed., by Keith), at p. 871.

[2] Westlake, *Private International Law*, 7th ed., pp. 28–33.

[3] See *Annuaire de l'Institut de Droit International*, 18 (1900), pp. 35–41.

[4] See especially Schreiber in *Harvard Law Review*, 31, pp. 523, 530–2.

As an example of the extension of the *renvoi* to include transmission to a third system of law, the case of *In re Trufort*[1] is usually cited. There a testator of British origin, Swiss nationality, and French domicil died leaving movable property, amongst other countries, in England. According to French law the succession to his estate was governed by Swiss law, and a judgment was obtained in the Swiss court distributing it accordingly. This judgment being challenged in England, French law, as the law of the testator's domicil, was applied. But as the appropriate French law was proved to import the Swiss judgment, the latter was upheld in the English court. The case, from the point of view of an authority on *renvoi*, is complicated by the fact that the subject-matter of the dispute was the validity of a judgment, and that such a judgment had to be recognized in France by virtue of a then-existing Franco-Swiss treaty. There is therefore force in the contention of Abbot[2] that the principle behind the decision was *res judicata* and not the *renvoi* at all, since the English court in effect applied French internal law by enforcing a judgment that any French court would have had to enforce.

The two ways of solving the difficulty of the inextricable circle suggested by Scrutton L.J. in the passage already cited from *Casdagli* v. *Casdagli*[3] merit reconsideration in this connexion. The first, it may be repeated, was put in this way:

> 'If the country of nationality applies the law which the country of domicil would apply to such a case if arising in its Courts, it may well apply its own law as to the subject-matter of dispute, being that which the country of domicil would apply, but not that part of it which would remit the matter to the law of domicil, which part would have spent its operation in the first remittance.'

This looks at first sight very like the 'open offer' formula. It is, however, materially different, because no serious attempt is to be made to ascertain as a fact what really is 'the law which the country of domicil would apply to such a case if arising in its Courts'. It is to be presumed, wherever there is a conflict as to choice of law, that the country of domicil would apply the internal law of the country of nationality. To adopt such a course in every case of conflict has undoubtedly the merit of simplicity and certainty. It is open, however, to every objection that can be raised to Westlake's theory, from which it differs only by reason of the fictitious assumption being that the foreign law (on the principle of the spent operation) will deliberately import the internal *lex fori*, instead of simply disclaiming the case and leaving the internal *lex fori* to apply for want of any law with a better claim. Uniformity it will certainly not promote.

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[1] 36 Ch. D. 600.

[2] See *Law Quarterly Review*, 24 (1908), p. 133.

[3] [1918] P. 89, 111.

The alternative 'German solution' ('not so logical') suggested by Scrutton L.J., he expresses by saying:

> '. . . if the country of domicil says, "We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects."'

This is in effect Westlake's *désistement* theory itself. The only difference is the purely academic one that, according to Westlake, the foreign court is assumed to act negatively in declining jurisdiction, whereas here it is deemed to act positively in remitting the matter. Thus interpreted, there is practically no distinction between this and the proposed first solution. But what Scrutton L.J. may perhaps have meant (though he hardly said so) is that where the foreign court adopted the 'German solution', the English court might regard this as agreeing with its own conflict rule and might apply the foreign internal law. If that is so, however, then no question of *renvoi* arises at all.

Lastly, the 'open offer' formula itself finds powerful academic support in the writings of Griswold[1] and Martin Wolff.[2] Both these learned writers admit the logical difficulties involved, but consider that so long as a working device can be consistently applied so as to break the endless circle, the major object of uniformity of decision would at any rate be achieved. According to Griswold's view, the English courts are right to accept the theory of the *renvoi*, and the American courts are wrong to reject it; first, because the problem of the endless circle, however inevitable in theory, would very rarely arise in practice; and secondly, because any solution whatever of a conflict of mutually inconsistent laws must always be arbitrary. As for Wolff's opinion, he goes to the length of directly approving what has here been called the 'open offer' formula (and what he regards as 'double renvoi') itself. He approves of it because, unless it is brought into conflict with a corresponding application of the same formula in another system of law, it can be made to work satisfactorily so as to obtain reasonably uniform results wherever the forum may chance to be.

VII. *The realistic view*

Seeing therefore that the jurists are no more agreed than are the judges, and that a flaw can be detected alike in every precedent and in every argument relating to the subject, can the question be answered as to whether the *renvoi* is or should be properly accepted as a sound doctrine of law? More particularly, can the 'open offer' formula be supported? The answer must depend upon what is to be regarded as the true test of soundness. Legislatures enact laws to provide and adapt a framework for the regulation of an ever-changing social order. Judges interpret and declare the law as it affects chance combinations of circumstances. To the writers it belongs to go back to first principles, to criticize, explain, and categorize haphazard decisions, fitting them into accepted theories or furnishing new theories with which to clothe them. But overriding all this is the central purpose of law, to provide society with justice, accessible, uniform, and predictable. Occasionally, as in the case of the *renvoi*, there is a legal deadlock inherent in the situation itself, from which there is no consistent way of escape, either by legislation or by precedent or yet on principle. It is then that the law at times becomes organic. It is not made; it is grown. Guided by judicial decisions to where it can take root and flourish, it is watered, trimmed, and tended by the writers, until it becomes and achieves recognition as a type of its own.

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[1] 'The Renvoi Revisited', in *Harvard Law Review*, 51, p. 1165.

[2] *Private International Law* (1945), § 188, pp. 196–8.

So it has been with the 'open offer' formula and the *renvoi*. The judges have reared it in the courts. Impelled by the necessity of avoiding the logical impasse of the inextricable circle, they have had in each individual case to find a device which would ensure that justice would be done. Sometimes it has gone against their own juristic inclinations. Often they have violated the strict rules of precedent. But they have always kept before them the fact that they were not solving theoretical problems but were dealing with matters that affected the lives and property of human beings. As Wynn-Parry J. once remarked in court to counsel who was protesting against the colourful way in which his opponent was presenting his case: 'Mr. L., you may take it that I shall take a realistic, not a surrealistic, view of this case.'

It is by taking a realistic view that the 'open offer' formula must be judged. Its ancestry may be doubtful viewed from the angle of legal consistency. Logically it may not bear examination. But it has no rival with a better legal title; and it leaves logic behind it, chasing its own tail. The point is that it can be made to work; and if and when it meets a situation in which it can no longer work, the same organic vitality that brought it into being will doubtless adapt it to those circumstances also, and evolve a new formula, as unorthodox it may be as itself, but no less effective as practical law.

‘EXTRA-TERRITORIAL’ ASYLUM

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THE term ‘ “extra-territorial” asylum’ is here used to indicate asylum given within the territory of the state from which refuge is sought. It refers to asylum in legations and consulates, and on warships and merchantmen in the ports of the state from which the individual seeking refuge is trying to escape. In this respect it differs from ‘territorial’ asylum, which is granted within the territory of the state which gives it. Extra-territorial asylum takes place in derogation of the territorial sovereignty of the state where it is granted.[1] For it limits the latter’s jurisdiction over all individuals on its territory, a jurisdiction which is by international law an essential attribute of state sovereignty. It is, therefore, not a practice which can be lightly followed; its legal basis must be clearly established. For it is a general principle of law that rights claimed in derogation of normal rules of international law must be clearly proved.[2] The United States, in particular, have insisted on that principle. Thus, in a letter to the Ambassador in Chile in January 1925, Mr. Hughes, Secretary of State, wrote:

> ‘A sovereign state enjoys the exclusive right to control and administer justice within its territory. . . . Because the granting of shelter is oftentimes . . . accorded with a view to withholding an individual from that jurisdiction, such action cannot be regarded with favour, except in very exceptional circumstances.’[3]

The main problem inherent in this aspect of asylum lies in the difficulty of reconciling the conflicting claims of humanitarianism and of state sovereignty. Such a reconciliation can be achieved within the framework either of the law of diplomatic immunities or of an independent rule of international law, whether conventional or customary.

I. *Basis of asylum*

1. *Asylum in legations*

(*a*) *Exterritoriality.* With regard to legations a basis for asylum might be found in the principle of the exterritoriality of legations which, it is claimed, means that the official residence of the diplomatic representative is excluded from the territory of the receiving state and placed in that of the sending state. Asylum given in legations could thus be assimilated to asylum given by a state on its own territory. For the place of refuge is declared to be in the territory of the state whose representative is giving shelter. There is consequently no question of interference with the territorial sovereignty of the state within whose normal frontiers the legation is situated. The development of the practice of asylum in legations did, in fact, receive a great impetus from the acceptance of the concept of exterritoriality in the seventeenth century,[1] and was only challenged when that principle itself was questioned.[2]

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[1] Cf. a speech by M. Negrin, then Spanish Premier, before the Spanish Cortes on 1 October 1937, where he stressed that diplomatic asylum affected Spanish sovereignty, and that disputes concerning it were not within the province of the Council of the League of Nations, to which the matter had been referred by Chile. *The Times* newspaper, 2 October 1937, p. 11.

[2] Cf. the advisory opinion of the Permanent Court of International Justice in the case of *Access of Polish War-vessels to the Port of Danzig* (*Publications of the Court*, Series A/B, No. 43, p. 142).

[3] *United States Foreign Relation Reports*, 1925, vol. i, p. 584.

However, though the concept of exterritoriality may have a certain value when used to describe the immunities due to the person of the diplomatic envoy, there is little substance in it in regard to legation buildings. Admittedly there have been a few utterances which seem to support the contrary view. Thus in 1891 the American Minister in Chile, writing to the Chilean Foreign Minister, said:

> 'The refugees are virtually in foreign country, and the decree of the Minister of Justice [subjecting the refugees to the judicial power of Chile] cannot reach the persons who are in the legation and beyond its jurisdiction.'[3]

He was neither supported nor disavowed by the Department of State, but in 1894 Secretary of State Gresham himself spoke of 'the admittedly exterritorial precincts of an envoy's dwelling'.[4] Again, a *note-verbal* from the Norwegian Foreign Office to the American Chargé d'Affaires in Norway in October 1918 stated that:

> 'the British and French citizens who had sought asylum in the American Consulate General, Moscow [then on the premises of the Norwegian Legation] had left, and that Norwegian extraterritoriality had not been violated'.[5]

In 1937, before the Council of the League of Nations, the representative of Chile claimed that the legations in Madrid were exterritorial. This was denied by the Spanish representative. The Council did not express any views on the subject.[6] In November 1948, during discussions in the Third Committee of the General Assembly of the United Nations on the Draft Declaration of Human Rights, the delegate of Uruguay suggested the inclusion of a right of asylum in Embassies and Legations in Article 12, which deals with the right of asylum in general.[1] He proposed to base this right on the exterritoriality of embassies:

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[1] Oppenheim, *International Law*, vol. i (6th ed., by Lauterpacht, 1947), § 390. It had actually been practised earlier under shelter of the inviolability of legations.

[2] Bynkershoek was one of the first to reject exterritoriality, and, with it, asylum. See Reale in *Recueil des Cours, Académie de droit international de la Haye*, vol. lxiii (1938) (i), p. 514.

[3] Gilbert in *A.J.* 3 (1909), p. 573.

[4] Letter to the American Minister in Turkey, 11 July 1894. Moore, *Digest of International Law*, vol. ii (1906), p. 772. The letter is in general terms and cannot be explained as referring to a capitulation country.

[5] *United States Foreign Relation Reports*, 1918 (Russia), vol. i, p. 619.

[6] *Official Journal of the League of Nations*, 1937, pp. 97–101.

> 'He would accept paragraph 1 of the original text if the words 'in other countries' were replaced by 'in the territories of other countries', the word territory being given its legal sense, and the right of asylum thus being extended to the embassies and legations of the countries concerned.'[2]

But he clearly admitted later that the concept of exterritoriality is not universally accepted:

> 'If that amendment were adopted countries which believed that the legal concept of territory extended to their legations and embassies abroad would be free to interpret Article 12 in that sense, whereas other countries would interpret it as applying only to their geographical territory.'[3]

The view which denies that legation premises are outside the territorial jurisdiction of the state where they are situated seems to be supported by better authority. That view was put forward by many nineteenth-century authors who used the 'fiction' of exterritoriality as a useful descriptive term, but denied that, in the language of Twiss,[4] it is 'so absolute' as to justify a right of asylum. Amongst writers in the twentieth century it is useful to cite Fauchille, who claims that modern theory has 'completely rejected' the idea of exterritoriality.[5] His view is supported by the report of the League of Nations Codification Sub-Committee on Diplomatic Privileges and Immunities:[6]

> 'It is perfectly clear that ex-territoriality is a fiction which has no foundation either in law or in fact. . . . The mere employment of this unfortunate expression is liable to lead to legal consequences which are absolutely inadmissible.'

There is, moreover, no lack of governmental authority, to the same effect, on the subject. In 1885 Mr. Bayard, United States Secretary of State, rebuked the American Minister to Colombia for basing his claim to grant asylum on exterritoriality. The latter, the Secretary of State said, was a mere 'figure of speech'.[7] Ten years later Secretary of State Olney wrote that no disparagement of the powers of a government under the mistaken fiction of exterritoriality could be countenanced.[8] At present that fiction is generally rejected.[9] While the principle of the inviolability of legation premises is recognized, they are considered to be under the sovereignty of the receiving state. The reason for this position is succinctly stated by the Circular

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[1] Art. 14 of the final draft.

[2] Doc. A/C.3/SR.121, p. 3.

[3] Doc. A/C.3/SR.122, p. 7.

[4] *Law of Nations* (1884), vol. i, para. 218.

[5] *Traité de droit international public*, vol. i (3) (1926), pp. 64 and 78.

[6] League Doc. C. 196. M. 70. 1927. V., p. 79.

[7] Moore, op. cit., vol. ii, p. 801.

[8] *United States Foreign Relations*, 1895, vol. i, p. 245.

[9] See cases cited in Oppenheim, op. cit., p. 711, n. 1.

Instructions to United States Diplomatic Officers in Latin America of 1930:

> 'The purpose of immunity is to enable representatives to fulfil their function fully. In other matters they should yield entire respect to the jurisdiction of the territorial government.'[1]

This means that no right of asylum can be deduced from the position of diplomatic representatives in international law. The ordinary diplomatic immunities cannot alone justify claims to a right which has no connexion with the essential purposes of the diplomatic mission. Phillimore, to cite only one of many writers on the subject, deplores that on this 'valuable and necessary immunity of the ministerial residence from the visitation of the ordinary officers of justice and revenue' there was 'at one time grafted the monstrous and unnecessary abuse of what was called the right of asylum'.[2] The United States standing instructions to diplomatic officers provide that the privilege of immunity from local jurisdiction does not embrace the right of asylum.[3] In 1896 the Law Officers of the Crown stated that the right to give asylum was in no way necessary for the discharge of an ambassador's duty, and that no such privilege could properly be asserted by an ambassador.[4] In November 1948 the Russian member of the Third Committee of the General Assembly of the United Nations objected to the Uruguayan proposal, mentioned above, of including a right of asylum in embassies in the Declaration of Human Rights, on the ground that the 'sole purpose of embassies and legations was to permit governments to transact business with one another'.[5]

As a rule, the receiving state cannot recover a refugee by force if the envoy refuses to surrender him. This is so owing to the inviolability of legation premises. But a right cannot be deduced from the mere fact that the other party has no immediate remedy—though the state has the ultimate remedy of dismissing the envoy himself. Moreover, the view is gaining ground that, after persistent refusal of delivery, fugitive criminals may even be recovered by force from legation buildings. In some cases this power has been justified by reference to the right of self-preservation which 'is recognized by the most learned publicists as superior . . . even to the immunities that are enjoyed by diplomatic agents'.[6] On the whole, however, it has been justified by the principle that the inviolability of the legation is meant to facilitate the performance of the functions of the envoy and does not extend to actions extraneous to this purpose. Most writers, indeed, have only discussed the problem with reference to common criminals, and have not specially touched on the more controversial question of the protection of political refugees.[1] But a passage of Woolsey recognizing the right of the local state to recover a fugitive by force from a foreign legation was considered applicable to the problem of political refugees by Major Stuart, British Chargé d'Affaires in Haiti, in a letter approved by Lord Granville.[2] In fact, a distinction between ordinary criminals and political refugees in this respect is not logical unless a right of asylum for the latter is established on another ground. For then a violation of asylum would constitute a breach of the rule of international law permitting its exercise. The mere inviolability of the legation premises which is granted only in so far as it is necessary for the independence and inviolability of envoys, and the inviolability of their official archives, cannot alone prevent the recovery of political fugitives any more than of common criminals.

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[1] Hackworth, *Digest of International Law*, vol. ii (1941), p. 623.

[2] *Institutes* (1897), vol. i, pp. 249 ff.

[3] Moore, op. cit., vol. ii, p. 229.

[4] *Reports from the Law Officers of the Crown*, 1896, pp. 8–11.

[5] Doc. A/C.3/SR.122, p. 3. The Uruguayan amendment was withdrawn before it could be put to the vote.

[6] F.O. 55/309: Letter from Colombian Foreign Minister, 16 February 1885.

(*b*) *Conventional law*. It has been suggested that Pan-American Conferences have attempted to make the right of asylum a universally recognized principle of international law by means of treaties.[3] It is doubtful whether this is true. Certainly the Conferences have not changed the legal position of the right of asylum materially in practice. In the first instance, there have been no conventions on the subject outside the American continent. Moreover, even on the American continent only the Treaty of Montevideo of 1889 on International Penal Law[4] imposes a direct obligation on the parties to respect the right of asylum. This treaty is binding on five countries: Argentine, Bolivia, Paraguay, Peru, and Uruguay. It applies only to the mutual relations of these states. The far more general Convention on Political Asylum, signed at Habana in 1928 by twenty states,[5] does not actually create an obligation. It provides in Article 2:

> 'Asylum granted to political offenders in legations, warships, military camps, or military aircraft, shall be respected to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted. . . .'

In other words, the source of obligation lies in pre-existing custom and convention. The treaty creates new obligations only with regard to the manner of the exercise of the right of asylum. This position was not altered by the Convention on the same subject signed at Montevideo in 1933,[6] which only added certain stipulations to the earlier treaty. It is significant, moreover, that the delegates of the United States appended an explicit reservation to both Conventions stating that the United States do not recognize the right of asylum. One should also mention the Treaty of Montevideo signed by six states on 4 August 1939.[1] According to its preamble it was designed to supplement the provisions of the Treaty of Montevideo of 1889. It was not concerned with providing a basis for asylum, as that had been done by the earlier treaty. It is worth noting, however, that this treaty followed very closely the suggestions of the Argentine Draft Convention of 1937 which was circulated to all European and American Governments. No support for it seems to have been enlisted outside this small circle of American states.[2] Thus it is hardly accurate to speak of the creation of regional international law on diplomatic asylum by means of treaties, and it seems very doubtful whether states, even in America, are prepared to give the subject a firm basis of conventional law.

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[1] Oppenheim, op. cit., vol. i (6th ed., 1947), p. 714; Fauchille, op. cit., vol. i (3) (1926), p. 77; Woolsey, *International Law*, 4th ed. (1874), p. 153.

[2] F.O. 35/118: Letter of 21 June 1883.

[3] Reale in *Hague Recueil*, vol. lxiii (1938 (i)), p. 530.

[4] For text of the relevant clauses (15–18) see Bahramy, *Le Droit d'Asile* (1938), pp. 123–4.

[5] For text see Hudson, *International Legislation*, vol. iv, pp. 2412–15. The Convention has been ratified by thirteen states.

[6] For text see Hudson, op. cit., vol. vi, pp. 608–11.

(*c*) *Custom and usage*. In resorting to the practice of states as guide to the legal position of internal asylum, we must bear in mind the distinction between custom and usage. Customary law comes into being only when practice is accompanied by a conviction on the part of states that their action is in accordance with international law.[3] Usage is the result of practice unaccompanied by such conviction. Customary rules are rules of law, and produce legal rights and obligations. Usage does not create legal relationships.

'Extra-territorial' asylum has often been given by states, including the leading powers of the world. The *United States Foreign Relation Reports* contain about fifty instances of asylum given by diplomatic and consular officers of the United States in the past hundred years or so.[4] The practice of Great Britain also shows many instances of the exercise of asylum.[5] In the records of the British Foreign Office there are also references to instances of the exercise of asylum by France.[6] But that practice has been confined to certain regions of the world. Diplomatic asylum is not exercised in the territory of most European countries,[7] or of the United States. This does not necessarily mean that that practice cannot have become customary international law; there exist rules which, in the common opinion of states, are of a legal nature even though they are not of universal application. But the fact that asylum is not exercised in the territory of the leading states, and is mainly resorted to in the 'backward' countries of the Near[1] and Far East[2] and of Latin America, suggests that it is a practice followed only in relation to states who are not fully civilized in the Western sense of the term, and that as such it is a temporary exception to the system of international law which obtains in the community of civilized nations.

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[1] For text see *A.J.* 37 (1943), Documents, pp. 99 ff. The treaty was signed by the signatories of the Treaty of Montevideo of 1889, and Chile.

[2] In the Third Committee of the General Assembly of the United Nations in November 1948 the representatives of Uruguay and Bolivia eventually withdrew their amendments to the Draft Declaration of Human Rights regarding asylum in legations. They explained this move on the ground that Latin-American countries considered that right sacred, and that it was preferable not to submit it to the vote as an adverse vote might weaken the principle (Doc. A/C.3/SR.122, p. 8).

[3] This is denied by Kopelmanas in this *Year Book*, 18 (1937), p. 130.

[4] In the same period asylum was refused several times.

[5] About thirty instances of asylum could be found in the Foreign Office Correspondence of the Years 1865–1902 at the Public Record Office, the majority of them referring to Haiti.

[6] These, again, mainly refer to Haiti (F.O. 35/74, 107, 118, 138, 162, 177).

[7] The main exception is Spain, where asylum was given in 1843 and 1845 (Moore, op. cit.,

Official utterances fully bear out the view that no customary law on the subject of asylum has come into being. British statesmen seem to have regarded the right of asylum as justified by local usage only. Bulwer, Ambassador to Spain in 1848, referred to a 'usage which, in a country of party passion, like Spain, was of common benefit'.[3] Sir Edward Grey, in the House of Commons on 30 June 1908, spoke of asylum in Persia as 'the usage of the country'.[4] It has been repeatedly so described in Latin America. The practice of the United States points the same way. The standing instructions to diplomatic officers of the United States[5] speak of the 'practice' and the 'usage' of asylum, and various Secretaries of State have done the same.[6] Often, indeed, that practice is described as a 'custom', but that is due to loose phraseology. No reference to customary *law* is intended. Thus Secretary of State Fish, in a letter to the American Minister in Haiti in 1875, wrote: 'since the custom is tolerated by other powers. . . .' Customary law is not something that exists by virtue of mere tolerance.

There is also evidence that the grant of asylum, even when it takes place, is not regarded as a right. Neither is it considered to be in accord with the general principles of international law. But it is necessary for the development of customary law that action should be regarded as legal. The statesmen of the United States have been particularly emphatic on this point. In 1875 Secretary of State Fish wrote to the American Minister in Haiti that 'such a practice has no basis in public law and is believed to be contrary to sound policy'.[7] Secretary of State Bayard, in 1888, put forward the same view:

> 'We do not regard asylum either in a legation or in a consulate as a right to be claimed

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vol. ii, pp. 768–9); in 1873 (*Annual Register*, 1873, p. 226); and in 1936–7 (*Official Journal of the League of Nations*, 1937, pp. 96 ff.).

[1] Particularly by Great Britain and Russia.

[2] Except in Japan.

[3] For the whole correspondence see F.O. 72/740 and 741.

[4] *Hansard, Parliamentary Debates*, 4th Series, vol. 191, col. 569.

[5] Moore, op. cit., vol. ii, p. 779.

[6] Fish (Moore, op. cit., vol. ii, p. 771); Bayard (*United States Foreign Relation Reports*, 1888, vol. i, p. 938); Gresham (ibid., 1893, p. 498); Bryan (ibid., 1913, p. 796).

[7] *United States Foreign Relation Reports*, 1875, p. 701.

under international law. We do not sanction or invite the exercise of asylum in those countries where it actually exists as a usage.'[1]

In 1895 Secretary of State Olney condemned diplomatic asylum in uncompromising terms:

> 'The practice of this kind of asylum is not a right derived from positive law or custom; it is not sanctioned by international law. . . .'[2]

Secretary of State Hughes wrote in a similar vein in 1925.[3] The United States circular instructions to diplomatic officers in Latin America issued in 1930[4] deny the existence of a 'right' of asylum. British practice was early summed up by Palmerston. In 1848 he wrote: 'Her Majesty's Government are quite ready to acknowledge that such a practice is in itself and in principle objectionable.'[5] In 1866 the Queen's Advocate spoke of asylum as an 'exceptional privilege not in accord with general law'.[6] The British Chargé d'Affaires in Guatemala, after he had sheltered a Guatemalan against arbitrary prosecution in 1870, wrote that he was aware that he had no right to grant asylum in his house to a citizen of the Republic.[7]

The states within the territory of which asylum is given by other states have not considered themselves bound to respect it. Of this the attitude of the Government of Chile in 1891 is a typical example. They were only prepared to grant safe-conducts for the evacuation of some refugees, it being clearly understood that it was 'an act of courtesy, and the spontaneous action of the government'.[8] In 1936 the Government of Spain, where there existed a local usage permitting asylum, declared that it had respected asylum 'through a spirit of tolerance and not because obligated to do so'.[9]

Diplomatic asylum is thus based on mere local usage. Such usage requires the acquiescence of the state where it is exercised. An emphatic expression of this view will be found in the opinion of the Law Officers of the Crown of October 1896[10] on the subject of the exercise of asylum by the German Consulate in Zanzibar. The opinion is of some interest as being the only one referring to asylum in British-protected territory. Also, though dealing with a case of consular asylum, it is an out-spoken statement by the Law Officers of their views on diplomatic asylum in general. The most important passage runs as follows:

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[1] *United States Foreign Relation Reports*, 1888, vol. i, p. 938.

[2] Ibid., 1895, vol. i, p. 245.

[3] Ibid., 1925, vol. i, p. 584.

[4] Hackworth, op. cit., vol. ii, p. 623.

[5] F.O. 72/739.

[6] *Reports from the Law Officers of the Crown*, 1866, p. 193.

[7] Dispatch No. 10 (21 February 1870), F.O. 15/147.

[8] *United States Foreign Relation Reports*, 1891, pp. 156–97.

[9] Hackworth, op. cit., vol. ii, p. 681. This sentiment was repeated before the Council of the League of Nations in February 1937 (*Official Journal*, 1937, p. 101).

[10] *Reports from the Law Officers of the Crown*, 1896, pp. 8–11.

> 'The proposition that as Consul the German Consul can grant an asylum to alleged criminals, whether political or ordinary, cannot, in our opinion, be sustained. It is true that such a privilege has been exercised by Diplomatic Representatives in Spain and in South America, and by Consuls in Persia, but there is, in our opinion, no doubt that this right of asylum, even in the case of Ambassadors, can be properly conferred only by the consent of the countries to whom they are accredited. It is in no way necessary for the discharge of an Ambassador's duty that his house should be an asylum for persons charged with crime of any description.'

A year earlier the United States Secretary of State Olney held that 'the practice of asylum can only find excuse when tacitly invited and consented to by the state within whose jurisdiction it may be practised'.[1] This is also the view of the Circular Instructions of 1930 to United States diplomatic officers in Latin America.[2] Article 2 of the Habana Convention of 1928, quoted above, lays down that the exercise of asylum is dependent on the laws of the local state. Article 3 of the Montevideo Convention of 1933, though somewhat obscure, is to the same effect.[3]

International practice shows numerous examples of acquiescence in the right of asylum. In 1859 the Haitian Secretary of State for Foreign Affairs stated that

> 'Le Gouvernement . . . n'a nullement l'intention de méconnaître, de changer, où d'altérer ce droit d'asile sacré dès l'antiquité . . . et qui, dans nos temps modernes si agités, a reçu tant et de si fréquentes applications.'[4]

In 1875 the United States Minister in Haiti reported that

> 'the Government of Haiti had always countenanced the practice of asylum, had refused to assent to its discontinuance, and had recently arrested negotiations for a Consular Convention with the United States by refusing to forbid the practice even in inferior consular offices'.[5]

In 1919 the United States Minister wrote from Honduras that the right of asylum was recognized 'tacitly, explicitly and officially by the authorities' there.[6] In the absence of explicit consent acquiescence may legitimately be inferred from the fact that asylum has been granted in the past. Thus the British Minister to Spain considered himself vindicated when, in 1848, the Spanish Foreign Minister

> 'confessed that it was customary in this country to give asylum to persons pursued for political offences; that all Spanish Governments have allowed this and all foreign agents have practised it'.[7]

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[1] *United States Foreign Relation Reports*, 1895, vol. i, p. 245.

[2] Hackworth, op. cit., vol. ii, p. 623.

[3] 'The States that do not recognise political asylum except with limitations and peculiarities can exercise it in foreign countries only in the manner and within the limits recognised by the said countries.' It is not clear to what rights other states are held to be entitled. It has been submitted that they, too, are dependent on local usage. The distinction is thus illogical.

[4] F.O. 35/77.

[5] *United States Foreign Relation Reports*, 1875, vol. ii, pp. 686–701.

[6] Ibid., 1919, vol. ii, pp. 378–82.

[7] F.O. 72/741.

In 1875 the United States Ambassador in Bolivia defended his action in giving asylum in his legation on the ground that it 'had been common'.[1]

While the acquiescence of the states giving asylum must be deduced from the fact that they give it,[2] they have occasionally shown a significant respect for accepted usage, without acknowledging their duty to do so. The United States, although it has repeatedly opposed the practice, has, nevertheless, often held that as long as the usage exists it does not wish to differ from other powers. In the words of Secretary of State Fish:

> 'Since the custom is tolerated by the other powers . . . we are not disposed to place the representatives of the United States in an invidious position by positively forbidding them to continue this practice.'[3]

Similarly, Lord Palmerston declared in 1848, after admitting that asylum was objectionable:

> 'While [the practice] continues to exist, a foreign minister could not, without discredit to himself and to his government, refuse to comply with it.'[4]

In the Treaty of 1837 between Great Britain and Persia the right of asylum was renounced, on the condition that it should not be exercised by any other Power.[5] This means, in effect, that asylum would only be discontinued after agreement by the main Powers exercising it. Unsuccessful attempts have at times been made to abolish it in this way.[6]

The question remains how far usage establishes a presumption that asylum can lawfully be granted. As has been shown, usage does not establish legal rights and duties, and there can therefore be no question of an obligation to allow asylum, or of a legal right to exercise it. There is thus no legal obstacle to the revocation of the privilege at the will of the local state on whose acquiescence the exercise of the privilege depends. The practice of states seems to show that, if the privilege has not been revoked prior to a specific instance of its exercise, failure to respect it is considered to be an unfriendly and discourteous act. An example of this attitude in connexion with earlier instances of asylum can be found in the instructions to the United States Minister in Chile in 1891:

> 'The right of asylum having been tacitly, if not expressly, allowed to other foreign legations, and having been exercised by our Minister in the interest and for the safety of the adherents of the party now in power, the President cannot but regard the application of another rule as the manifestation of a most unfriendly spirit.'[7]

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[1] *United States Foreign Relation Reports*, 1875, vol. ii, p. 82.

[2] This is not altogether true. The action of a diplomatic representative may be disavowed by his Government, or approved only with the greatest hesitation. See, for example, F.O. 15/147.

[3] *United States Foreign Relation Reports*, 1875, vol. ii, p. 701.

[4] F.O. 72/739.

[5] Text in Hertslet, *Commercial Treaties*, vol. x, p. 947.

[6] The United States approached Great Britain on the subject in 1870 (Confidential 5035, printed in F.O. 55/309).

[7] Moore, op. cit., vol. ii, p. 791.

In 1936 fourteen legations granted asylum in Madrid. Although the Spanish Minister of State gave notice to the Doyen of the Diplomatic Corps, on 13 October 1936, that Spain was compelled by notorious abuses to terminate its attitude of respect for asylum,[1] none of the legations gave up their refugees and all were eventually evacuated. Violation of asylum cannot, however, be regarded as more than unfriendly action; it is not a violation of a legal obligation. Occasionally it has caused a great stir. Thus the violation of the French legation in Haiti in 1915 provided a pretext for the occupation of the island by the United States. But this has been due to the barbarity of the proceedings more than to the fact of violation.[2]

When there is no specific issue in question it is clear that asylum can be unilaterally denounced. In 1867, when Peru proposed to end the exercise of asylum in her territory, the Brazilian Minister claimed that the previous accord of the diplomatic body was necessary.[3] In fact all the states accepted Peru's notice that she was ending the privilege.[4] Since then there appear to have been two instances of the exercise of asylum there: in 1913 by Italy, and in 1930 by the United States. In both cases it seems that the government in power agreed.[5] There were no complaints in 1868 when Paraguay refused to permit the continuance of the practice,[6] and in 1885 the American Minister in Colombia was reprimanded for objecting to Colombia's notice that she might not tolerate asylum in the future.[7] Similarly, when Haiti in 1908 gave notice of the ending of the privilege, the Great Powers agreed to cease giving asylum, at least in consulates. Only Mexico objected on the ground that she could not countenance this precedent of allowing a state by its own determination to suppress a practice admitted by the community of states. Actually asylum has since been given in Haiti; in 1915, for instance, it was exercised in legations and consulates.[8] Iran seems to have terminated the practice in her territory at the time of the abolition of the Capitulations in 1928, and her permanent delegate to the League of Nations stated in 1937 that asylum there had not been exercised for a long time.[9]

(*d*) *Humanitarian intervention.* Some writers, mainly Latin-American, have justified asylum for all political refugees by reference to humanitarian considerations. Calvo treats diplomatic asylum in this way, though he admits that in itself it has no basis in international law:

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[1] Hackworth, op. cit., vol. ii, p. 631.

[2] Both in 1865 and in 1873 the Law Officers of the Crown urged moderation after the violation of (consular) asylum by Haiti and San Domingo, on the ground that Great Britain had no legal rights. Admittedly they did not consider the existence of a usage proved at the time (*Reports from the Law Officers of the Crown*, 1865, pp. 59–60; ibid., 1873, pp. 68–9).

[3] Moore, op. cit., vol. ii, p. 836.

[4] Great Britain was non-committal at the time (*Reports from the Law Officers of the Crown*, 1867, p. 54).

[5] *United States Foreign Relation Reports*, 1913, pp. 1141–7; Hackworth, op. cit., vol. ii, p. 648. With regard to four states Peru is since 1889 bound to respect asylum.

[6] Moore, op. cit., vol. ii, pp. 825–31.

[7] Ibid., p. 801.

[8] *United States Foreign Relation Reports*, 1915, pp. 474 ff.

[9] League Doc. D.C. 123. M. 75, 1937, VII.

> 'On ne saurait se guider en cette matière que d'après des considérations générales d'humanité. . . . Nous admettons donc qu'au milieu des troubles civils qui surviennent dans un pays l'hôtel d'une Légation puisse et doive même offrir un abri assuré aux hommes politiques qu'un danger de vie force à s'y réfugier momentanément.'[1]

Similarly, Nervo speaks of asylum 'point comme une immunité . . . mais comme un acte d'humanité impérieuse'.[2] Writers of this group do not deny that asylum constitutes intervention in the internal affairs of another state, but justify it as being so-called humanitarian intervention. Undoubtedly international law recognizes to a certain extent the principle of humanitarian intervention. At one stage it was resorted to by the Great Powers, particularly on behalf of persecuted minorities in Turkish territory.[3] However, that practice is by no means firmly established in law. It has also frequently been criticized on the ground of expediency.[4]

The practice of the United States has produced a different theory, which is governed by the desire to respect unconditionally the sovereignty of the local state. Government spokesmen have attempted to evolve a theory whereby United States representatives abroad, though not justified generally in giving asylum, are allowed to protect individuals against mob-violence when a state of anarchy prevails for the reason that there is either no government at all, or only a government too weak and insecure to protect its citizens. Refuge must end as soon as the local Government is again fully in control. The doctrine is fully explained by Secretary of State Hughes in the instructions to the Ambassador in Chile in 1925,[5] and the relevant passages merit quotation in full:

> 'While the Department has at times approved of the yielding by an American diplomatic officer of temporary shelter to an individual when the safety of his life was threatened as by mob violence in a country where conditions of great disorder prevailed, the significance of such an exceptional situation should not be misconstrued. It is based on the theory that disorderly conditions productive of mob violence, for example, have so impaired the power or disposition of local authorities to administer justice as to render inapplicable for the time being the principle above set forth.[6] An American diplomatic officer must therefore exercise utmost discretion in determining whether such extra-ordinary conditions exist and continue to exist throughout the period during which shelter is sought and granted. . . . That a refugee should be sought by his political enemies for an essentially political offence would not necessarily bring

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[1] *Le Droit international* (1896), vol. iii, p. 370.

[2] In *Dictionnaire diplomatique*, vol. i, p. 207.

[3] See Oppenheim, *International Law*, vol. i (6th edition by Lauterpacht, 1947), pp. 279–80.

[4] See, for example, Jessup in *A.J.* 32 (1938), pp. 116–19.

[5] *United States Foreign Relation Reports*, 1925, vol. i, p. 584.

[6] That there must be no interference with the exclusive right of the sovereign state to administer justice in its territory.

> the case within the exceptions noted, at least if such an offence were one made punishable by the local law, and if there was no reason to believe that the rights accorded an accused person for purposes of defence would not be respected.
>
> 'An individual fleeing before a mob might be given temporary refuge in an American mission, if he entered the same in the course of flight, until the mob dispersed, or until the mission could turn him over to the authorities of the country, *de facto* or otherwise, who were in a position to protect him from similar outbreaks of mob violence. The fact that a person already in the custody of the local authorities is in danger of mob violence would not suffice to justify intervention by an American diplomatic officer. Should the individual break away from the authorities in the face of a mob attack and seek refuge in an American mission he might be given refuge until the authorities were again in a position to resume custody of the fugitive and accord him protection from mob violence.'

How well this theory meets the desires of the states where asylum is exercised can be seen by comparing the statement of Secretary Hughes with the Circular of the Haitian President of 27 October 1883;[1] the letter of the Foreign Minister of Colombia to the British Minister there of 16 February 1885;[2] and the correspondence of the Haitian Foreign Minister with the British Chargé d'Affaires in 1869 on the subject of Mme Alexis Nord.[3] In all of them the view was expressed that, while a privilege of asylum was recognized to exist, it could not be extended to persons guilty of contravening the laws of the country whatever their content, and sought by the judicial or governmental authorities.

There is evidence of the application of that theory in early instances of the attitude of the United States on asylum. Thus in 1879 Secretary Evarts wrote that his Government was 'indisposed, from obvious motives of humanity, to direct its agents to deny shelter to any unfortunate threatened with mob violence', though it would not countenance 'any attempt . . . to harbour offenders against the law'.[4] At no time did the United States admit that usage offered a full justification for granting asylum. Since the instructions given by Secretary of State Knox in 1912, when he pointed out the distinction between asylum in the strict sense and cases in which temporary refuge is given in order to preserve innocent human life,[5] the American State Department has been emphatic that only the latter can be tolerated. When in 1919 the American Minister in Honduras gave asylum to the political opponents of the Government, he specifically invoked the acquiescence of the local Government. He added that the ground of asylum was 'their declaration and my belief of imminent peril of their lives'.[6] In all cases when the question of asylum came up for consideration after 1930 the Department of State was exclusively concerned to determine whether the conditions necessary to justify 'temporary shelter' existed.[7]

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[1] F.O. 35/118.

[2] F.O. 55/309.

[3] F.O. 35/77.

[4] *United States Foreign Relation Reports*, 1879, p. 582.

[5] Ibid., 1912, pp. 861 ff.

[6] Ibid., 1919, vol. ii, pp. 378–82.

[7] See, for example, ibid., 1930, vol. iii, p. 174.

Thus in 1932 it did not authorize asylum in Chile, because 'there was no immediate danger of violence'.[1] On the other hand, the report of the Minister in Ethiopia in 1937 that the legation was the only safe place for some 500 natives who had broken in elicited the reply that 'for humanitarian reasons the Department of State is desirous to leave the disposition of these persons at the Minister's discretion'.[1] Though in 1936 it prohibited the granting of asylum to Spaniards in Madrid, it added significantly:

> 'where the immediate question of life is at stake you should of course extend such protection as the limitations of the Embassy permit'.[2]

British practice has also shown a desire to keep asylum within limits dictated by the urgent requirements of humanity. In 1876 Lord Derby approved the resolution of the diplomatic corps at Port au Prince, Haiti, to the effect that protection in a legation there was to be granted only in cases where life was in imminent danger.[3] In 1883 the Foreign Office, after consulting the Law Officers, replied to a Circular of the Haitian President which called on the diplomatic representatives to confine the right of asylum to the limits prescribed by humanity by stating that, as President Salomon admitted the propriety of the exercise of the right to that extent, the matter did not call for any observations.[4] In 1888 Consul General Zohrab, in charge of the legation in Haiti, was informed:

> 'In the event of disturbances taking place you should be very cautious with regard to giving asylum to natives of the country. Such asylum should be extended only to persons in imminent peril of their lives, and where it is called for by the common dictates of humanity.'[5]

But the British practice differs significantly from that of the United States in that British representatives in countries where local usage permits the exercise of asylum have not been instructed to deny shelter to everyone fleeing from a governmental authority, or to surrender all such persons to constituted authority.[6]

It is difficult to estimate the relative merit of the American theory. It represents a laudable attempt to find an acceptable basis for the most urgent cases of asylum. It tries to limit the element of discretion. For, while the British representative has to decide in each case whether 'imminent peril' exists, the American agent is only empowered to act in cases of mob-violence, and is not permitted to judge cases of governmental action. On the other hand, the American theory limits the exercise of asylum very severely. There are cases, admittedly rare, when the Government itself proceeds with great brutality. The acts of the Haitian Government in 1879, as reported by the British Chargé d'Affaires,[1] would amply justify asylum. In 1908 the United States Department of State, too, instructed its local representative that '. . . we deny sanctuary against due process of law, but we will protect refugees against summary lawless slaughter' after the summary shooting, by governmental authorities, of some refugees who had been surrendered by an American Consulate.[2] Yet it seems illogical to deny shelter to refugees from governmental authority on the ground that such authority must be respected and yet take it upon oneself to judge the lawfulness of its actions. Probably the best way to reconcile the claims of humanitarianism and state sovereignty is to make a decision in good faith on the merits of each case. But it must be stressed that except in countries where a usage exists legations have no power to go farther than the American theory allows, for no rule of law permits asylum.

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[1] Hackworth, op. cit., vol. ii, p. 630.

[2] Ibid., p. 631. Great Britain did not give asylum in its legation then, either; whether for the same reason is not clear. See Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (1939), p. 157.

[3] Major Stuart, No. 8, 21 January 1870; To Major Stuart, No. 7, 4 March 1870.

[4] Mr. Hunt, No. 44, 29 October 1883; Opinion of the Law Officers, 15 December 1883; To Mr. Hunt, No. 16, 27 December 1883.

[5] F.O. 35/118.

[6] This does not affect the questions whether the local state can take individuals by force out of a legation in violation of local usage, or despite the inviolability of legations. These have been discussed earlier.

The American theory helps to justify asylum where it is not normally sanctioned by usage, or where the usage has been renounced. In this sense it appears to have been used by other states as well. The most significant example refers to consular asylum and will be discussed under that heading. But the principle in question may help to explain the meaning of the Peruvian statement at the time when Peru denounced the privilege in 1867:

> 'The Peruvian Government will not hereafter recognise diplomatic asylum as it has been practised up to the present time in Peru, but solely within the limits assigned to it by the law of nations, which are sufficient to solve the exceptional cases which might arise in this matter.[3]

It should be particularly noticed that the diplomatic representatives of various states had no scruples about exercising asylum in the disorderly conditions in Russia immediately after the Revolution.[4]

The American theory also facilitates the exercise of asylum in consulates.

2. *Asylum in consulates*

Strictly speaking, the difference between legations and consulates is not as great with regard to asylum as it is in many other respects. The main difference between the two as a rule is that recognized immunities attach to the legation while the same is not true of consulates. But, as has been shown, the immunities of legations do not include a general right of asylum, and they are in this respect not superior to consulates. Again, it is true that the consulate is not inviolable,[1] but, as has been shown, the view is gaining ground that the inviolability of legations is only meant to facilitate their functions, and may be violated to recapture refugees which it was no diplomatic function to shelter. The difference is only that in the one case it is certain that as a rule there is no right of asylum and that refugees may be recaptured by force, and in the other case there is no such certainty. This position was clearly reflected in the opinion of the Law Officers of the Crown after the violation of asylum in the British Consulate at Cap Haytien in 1865:

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[1] F.O. 35/107.

[2] Hackworth, op. cit., vol. ii, p. 634.

[3] Moore, op. cit., vol. i, p. 842.

[4] See *United States Foreign Relation Reports*, 1918 (Russia), vol. i, pp. 667–9; ibid., vol. ii, p. 22; ibid., 1919 (Russia), pp. 549–50.

> 'The consular dwelling has not the privileges which attach to the dwelling of an Ambassador, and without stopping to inquire whether such a privilege as the reception and protection of refugees would have been incident to the latter, it is clear that it was not incident to the former.'[2]

We find the same distinction in the statement by the United States Secretary of State Gresham in 1894:

> 'This Government does not sanction the so-called right of asylum even as to the admittedly extra-territorial precincts of an envoy's dwelling, and it does not recognise it in respect to a consulate.'[3]

Similarly consulates, like legations, can in certain circumstances acquire the privilege of exercising asylum. Asylum has been given by consulates in the Capitulation countries where, admittedly, their status is peculiar. But the privilege of asylum in consulates, as in legations, can be acquired by usage, with the acquiescence of the local state. This was admitted by Sir Robert Phillimore, the Queen's Advocate, in his Opinion of 22 December 1865 on the violation of asylum in the British Consulate at Cap Haytien:

> 'It is certainly possible that by long usage, as well as by direct concession, the Consular Residence may have acquired privileges in the matter. . . .'[4]

In his opinion of 12 March 1866, on the same matter, he considered that the existence of the privilege was proved:

> 'The government of Haiti has been in the habit of granting to the consular house the privilege of protecting refugees. The present government of Haiti appears to desire the continuance of that privilege.'[5]

At the same time a usage of consular asylum has developed only in a very small number of countries.[1] Again, the states in question have made far more determined efforts to revoke the privilege of consular asylum than the similar privilege in legations. Thus in his letter to the diplomatic corps of 17 May 1884 the Foreign Minister of Haiti asserted, not very successfully, 'Que les simples Consulats ou Agences Consulaires ne pourront accorder asile à aucun individu recherché par l'autorité.'[2] Moreover, the states exercising it were also more willing to renounce the benefits of a usage. Thus in 1866 and 1873 respectively Great Britain renounced its right of consular asylum in Haiti and San Domingo.

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[1] Cf. the remarks of the Law Officers of the Crown in 1896: 'If [the consul] refused to give the entry [for the purpose of arresting any person charged with crime, whether of a political nature or not], arrest might be made without his concurrence. . . .' (*Reports from the Law Officers of the Crown*, 1896, pp. 8–11.)

[2] Ibid., 1865, pp. 59–60**.

[3] Moore, op. cit., vol. ii, p. 847.

[4] *Reports from the Law Officers of the Crown*, 1865, pp. 59–60**.

[5] Ibid., 1866, p. 193. See also ibid., 1867, pp. 65–6.

The humanitarian theory produced by the practice of the United States can thus play an important part in providing a basis for asylum in consulates, where, incidentally, it is desirable that there should be less discretion in its exercise, as the consul is often a subject of the state where he functions. British practice, in places where there is either no usage or usage has been renounced, seems to follow the instructions given to Consul-General McGuffie in Haiti on 16 December 1884,[3] and to Vice-Consul Wyndham there on 21 June 1883,[4] seventeen years after the benefit of a usage of consular asylum had been renounced:

> 'Shelter in Consulates should in future be extended only to persons in imminent peril of their lives, and where such action is called for by the common dictates of humanity.'[3]
>
> 'In affording asylum you are to act on your own responsibility and judgment, but if the Consulate is besieged, or the refugees taken, you are to offer no violence or resistance.'[4]

The second of these clauses clearly provides that consulates cannot protect refugees sought by the governmental authorities. But it is significant that a Foreign Office Memorandum of April 1885[3] was uncertain about the desirability of this provision. Answering the question whether 'protection' as well as 'shelter' should be given, it affirmed the validity of the instructions of 1883 and 1884, but added that 'imminent peril' of the first provision might lie precisely in a siege by government forces, and concluded that, after all, the Consul 'must be guided by the circumstances of each case'. Actually, practice seems to have followed the assumption that consulates could not refuse to surrender to legally constituted authorities.[5]

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[1] Haiti and San Domingo are the chief examples.

[2] F.O. 35/122.

[3] Annex A to the Admiralty Instructions, in F.O. 35/177.

[4] F.O. 35/118.

[5] It has been shown that they have no power to do otherwise where no usage exists. Cf. Stewart, *Consular Privileges and Immunities* (1926), p. 89: 'Where the offender is fleeing from a mob which the local authorities are unable to control, the consul will be upheld if he gives temporary refuge; but when the offender is fleeing from the legally constituted authorities, the consul may not grant refuge.'

The American practice with regard to consulates has been the counterpart to its practice with regard to legations. The instructions of Secretary Knox, pointing to the distinction between asylum in the strict sense and cases in which temporary refuge is given in order to preserve innocent human life,[1] were sent to the Consul at Vera Cruz as well as to the Ambassador in Mexico.[2] Between 1910 and 1913 there are five instances of instructions to consuls based on that distinction and allowing consular officers discretion in determining the course to be taken 'upon broad considerations of humanity'.[3] In 1913 the Director of the Consular Service of the United States, in instructions to a consul in Mexico, specifically permitted the granting of shelter to women and children.[4] The most recent instructions of the United States would seem to be the Foreign Service Regulations of July 1939,[5] Section III of which contains regulations on the subject of asylum. They are addressed to diplomatic and consular officers alike, and rely uncompromisingly on the humanitarian theory:

> 'Involuntary refuge: The extension of refuge to persons outside the official or personal staff of a diplomatic or consular officer can only be justified on humanitarian grounds. Diplomatic and consular officers may afford refuge to uninvited fugitives whose lives are in imminent danger from mob-violence, but only during the period active danger continues. Refuge must be refused to persons fleeing from the pursuit of the legitimate agents of the local government.'

3. *Asylum in warships*

The basis of asylum in warships is very similar to that in legations, and can therefore be treated more briefly. Admittedly there is stronger authority in favour of the view that warships are exterritorial, and that there is thus, in respect of them, a legal basis for asylum. Oppenheim, for instance, regards the public ship as a 'floating portion of the flag-state'.[6] There have, moreover, been statements on the specific subject of asylum which suggest that the speakers regard warships to be the equivalent of national territory. In 1911 the Foreign Minister of Ecuador, while objecting, in a particular case, to the exercise of asylum, admitted that 'warships are without doubt parts of national territory', and assimilated asylum there to territorial asylum.[7] Before the Council of the League of Nations in 1937 the Spanish delegate, in answer to Chilean claims with regard to asylum in legations supported by evidence of asylum in warships, drew a distinction between asylum in legations and in warships.[8] But there is authority on the other side. Exterritoriality of warships is denied by Westlake[1] and Fauchille.[2] The Judicial Committee of the Privy Council in *Chung Chi Cheung* v. *The King*[3] put forward the view that 'however the doctrine of exterritoriality is expressed it is a fiction'. Moreover, practice in regard to asylum in warships has not apparently resorted to exterritoriality as a justification. Baldoni suggests that the practice of states supports the view that only such immunities are granted as are necessary for the fulfilment of the function of a ship. He concludes: 'L'exterritorialité réelle d'un navire n'est pas, à elle seule, suffisante, pour lui faire reconnaître le droit d'accorder l'asile.'[4] In 1862 the United States protested vigorously against the action of a Spanish warship in taking citizens of the United States aboard in New Orleans, and claimed that foreign vessels must comply with the rule that they will only carry members of their own services.[5] It is also worth noting that surrender, not extradition, is usually considered the correct method of returning criminals who have boarded a ship.[6] Exterritoriality is thus not a satisfactory basis for asylum on war vessels. It should, however, be added that in all probability refugees cannot be forcibly removed from men-of-war. In 1862 the Law Officers of the Crown implied that it was illegal to do so; they held that an attempt by the Governor of Panama to remove some refugees from a British mail-packet was an infringement of the Postal Convention which gave British mail-steamers the status of ships of war.[7]

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[1] See above, p. 248.

[2] *United States Foreign Relation Reports*, 1912, p. 925.

[3] Ibid., pp. 173–4; ibid., p. 393; ibid. 1913, p. 796; Hackworth, op. cit., vol. ii, pp. 636–7.

[4] Hackworth, op. cit., vol. ii, p. 645.

[5] Ibid., p. 623.

[6] *International Law*, vol. i (6th ed. by Lauterpacht, 1947), p. 764.

[7] See Scelle in *Revue générale de Droit international public*, 19 (1912), p. 630.

[8] 'M. Edwards was confusing the extra-territoriality of a vessel which was part of the national

The conventional basis of asylum in warships is the same as that of asylum in legations. The same Latin American Treaties are concerned with both. There are, in addition, several treaties regarding the freeing of slaves who succeed in boarding a foreign warship, of which the most important is the General Act of Brussels of 1890 for the suppression of the African slave-trade. But these deal with a very special class of cases, and with a problem which is not solely one of international law.

In fact, it would appear that asylum in warships, though exercised fairly frequently,[8] is no more than a local usage resorted to in states where frequent revolutions occur. This is the view expressed in the United States Naval Regulations of 1894, 1896, and 1900: 'in countries where frequent revolutions

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territory, with the extra-territoriality of Embassies and Diplomatic Missions' (*Official Journal of the League of Nations*, 1937, p. 101).

[1] *International Law*, 2nd ed. (1910), vol. i, p. 168.

[2] *Traité de droit international public*, vol. i (2) (1926), p. 983.

[3] [1939] A.C. 160.

[4] In *Recueil des Cours, Académie de la Haye*, 65 (1938), p. 235.

[5] Moore, op. cit., vol. ii, p. 828.

[6] See Oppenheim, op. cit., vol. i, p. 765; and General Act of Brussels of 1890 for the Suppression of the African Slave-trade, Art. XXVIII.

[7] *Reports from the Law Officers of the Crown*, 1862, pp. 310–12.

[8] For examples, see Baldoni, op. cit., p. 287; Moore, op. cit., vol. ii, pp. 845–54; F.O. 35/138. For accounts of naval asylum in the Spanish Civil War see Hansard, *Parliamentary Debates*, House of Commons, 5th series, vol. 322, col. 25; ibid., vol. 323, cols. 770–1.

occur . . . local usage sanctions the granting of asylum'.[1] Moreover, it is clear that the practice in question has not, as a rule, been regarded as grounded in a legal right. Gidel's considered judgment is that 'il est illégitime de la part d'un navire de guerre étranger de soustraire des inculpés ou condamnés politiques à l'action des autorités'.[2] The above-mentioned Naval Regulations of the United States state unequivocally: 'The right of asylum for political or other refugees has no foundation in international law.' However, Secretary of State Blaine seems to have considered in 1890 that a local usage of naval asylum, as of diplomatic asylum, must be respected unless previously denounced.[3]

At the same time it is significant that, in this respect, the practice of nations generally has kept asylum within the limits of strictly circumscribed humanitarian considerations. This applies to the practice of the United States. In 1891 the instructions of the Secretary of the Navy to the warships off Chile ran as follows:

> 'The obligation to receive political refugees and to afford them an asylum is in general one of pure humanity. It should not be continued beyond the urgent necessities of the situation.'[4]

In 1894 President Cleveland, in his Annual Message, explained the asylum given to the 'Salvadorian Refugees' as follows: 'in view of the imminent peril which threatened the fugitives and solely from considerations of humanity they were afforded shelter. . . .'[5] In 1913 Secretary Bryan would only concede that 'temporary shelter . . . has sometimes been conceded on the grounds of humanity'.[6] British practice has been similar. Though in 1849 Palmerston seemed to suggest that British war vessels would shelter all political refugees,[7] the instructions to the Vice-Admiral off Greece in 1862 stressed that his duty was 'limited . . . to affording protection to any refugees . . . who would be in danger of their lives without such protection'.[8] The Admiralty Instructions of 1875 laid down that even fugitive slaves should only be admitted if their lives would be in manifest danger if they were not received on board.[9] It is also worth noting that both the French Naval Instructions of 1885[10] and the Italian and German Naval Instructions[11] stress the need for 'immediate danger' to justify asylum.

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[1] Turpin, *L'Asile politique* (1937), pp. 36–7.

[2] *Droit international public de la mer*, vol. ii, pp. 285–6.

[3] Gilbert in *A.J.* 3 (1909), p. 571.

[4] Moore, op. cit., vol. ii, pp. 851–2.

[5] Ibid., p. 852.

[6] *United States Foreign Relation Reports*, 1913, p. 855.

[7] *British and Foreign State Papers*, vol. l, p. 803.

[8] Ibid., vol. lviii, p. 1057.

[9] Ibid., vol. lxvi, p. 892.

[10] Bahramy, *Le Droit d'Asile* (1938), p. 93.

[11] Baldoni, in *Recueil des Cours, Académie de droit international de la Haye*, vol. lxv (1938) (iii), p. 235.

4. *Asylum in merchant vessels*

Merchant vessels enjoy no exemption from local jurisdiction. Accordingly they cannot shelter refugees fleeing from the local authority. This is confirmed by the Opinion of the Queen's Advocate, Sir Robert Phillimore, of 6 March 1865, on the position of political refugees on British vessels passing through Equatorian waters. He said:

> 'That merchant vessels, while in the ports of a foreign state, are so far amenable to its jurisdiction as to be liable to be searched for native subjects credibly alleged to be on board, and charged with offences committed within the territories of that state, and that it is competent to the proper authorities of such state, especially after due warning, as in the present case, to take such persons out of the merchantship.'[1]

There has been one treaty permitting asylum on merchant vessels. Article X of the Treaty of Peace and Amity concluded between the Central American Republics on 20 December 1907 provided as follows:[2]

> 'The Governments of the contracting parties bind themselves to respect the inviolability of the right of asylum aboard the merchant vessels of whatever nationality anchored in their ports. Therefore only persons accused of common crimes can be taken from them after due legal procedure and by order of the competent judge. Those prosecuted on account of political crimes or common crimes in connection with political ones can only be taken therefrom in case they have embarked in a port of the state which claims them during their stay in its jurisdictional waters, and after the requirements hereinbefore set forth in the case of common crimes have been fulfilled.'

That provision only safeguards refugees in transit,[3] and not those actually embarking in the port where they are sought.

In theory, it would have been possible for a usage permitting asylum in merchant vessels to arise. However, it does not appear that this has actually happened. In *The Barrundia* case in 1890 the United States Secretary of State Blaine held that a common usage had come into being permitting asylum for political refugees on merchant vessels,[4] but his assumption that such asylum had never been denied is erroneous. In 1893 Secretary Gresham came to the opposite conclusion.[5] Such examples as there are of the exercise of asylum in merchant vessels come from countries such as Turkey[6] or China,[7] where the Great Powers had acquired special privileges.

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[1] *Reports from the Law Officers of the Crown*, 1885, p. 31. See also *United States Foreign Relation Reports*, 1885, p. 542; Hackworth, op. cit., vol. ii, pp. 641–2; Moore, op. cit., vol. ii, pp. 856–7; *Revue générale de Droit international public*, 19 (1912), pp. 629–32.

[2] *A.J.* 2 (1908), Official Documents, p. 224.

[3] The distinction between these and those who embark in the port where they are claimed is based on the fact that in the latter case the local law is violated, and not in the former.

[4] *United States Foreign Relation Reports*, 1890, pp. 136–41. See also Coudert in *Journal de droit international* (*Clunet*), 23 (1896), p. 780.

[5] *United States Foreign Relation Reports*, 1894, p. 296.

[6] For example, by Great Britain in 1908 (Bahramy, op. cit., p. 86); and by Italy at the same time (ibid.).

[7] For example, by the United States in 1915 (Hackworth, op. cit., vol. ii, p. 641).

II. *Limits of asylum*

On the basis of humanitarian intervention as interpreted by the practice of states, and that of the United States in particular, internal asylum is severely limited—so severely, some might hold, as to nullify one of the underlying reasons for the use of asylum, namely, that the only power who can safeguard an individual against a state is another state. Whether such limitation is desirable or necessary has been discussed above. Here we may note that there are universally recognized limits to the exercise of asylum. These limits fall into two main groups: one bears upon the persons to whom asylum can be given, the other upon the manner of its exercise.

Asylum cannot be given to ordinary criminals. The Convention of Habana of 1928 states this in clear terms:

> 'It is not permissible for States to grant asylum in legations, warships, military camps or military aircraft to persons accused or condemned for common crimes, or to deserters from the army and navy.'[1]

This was amended by the Montevideo Convention of 1933 to read:

> 'It shall not be lawful for the States to grant asylum in legations, warships, military camps and airships to those accused of common offences who may have been duly prosecuted, or who may have been sentenced by ordinary courts of justice, nor to deserters of land or sea forces.'[2]

The substitution of 'lawful' for 'permissible' deserves note. Both treaties further stipulate that such persons should be handed over immediately.[3] This limitation is not only based on a convention the application of which is by no means universal, but is part of general practice. British practice has applied it to legations. Thus in 1874 a Foreign Office Minute, referring to the case of M. Haentjens, an Haitian ex-Minister of Finance, who had been called on to give an account of his administration, and had sought asylum in the British Legation, stated:

> 'I think in answering Mr. St. John he might be given a hint that he should be careful not to allow the right of asylum to be abused by persons guilty of ordinary crimes.'[4]

In 1885 the Foreign Office told its representative at Bogotá that a Colombian who had been sheltered by the Argentine Legation and was merely endeavouring to evade payment of a war contribution, 'had no right to demand or receive shelter under the roof of a Foreign Legation'.[5] Similarly, the American Minister in Bolivia in 1875 refused to give asylum to insurgents because he regarded them as criminals to be tried for incendiarism and murder.[1] In 1895 the State Department of the United States decided that refugees in their legation at Chile should be given up because they were wanted on criminal charges.[2] The same is true of warships. Palmerston stated in 1849 that it would not be right to receive and harbour on board of a British ship of war any person fleeing from justice on a criminal charge.[3] The Admiralty Instructions of 1875 subscribed to a similar view, though they regarded it as a matter of 'international courtesy' only.[4] The General Act of Brussels of 1890 provided in Article XXIII that slaves guilty of any offence at common law could not be withdrawn from the local jurisdiction. The instructions of the United States Secretary of the Navy in 1891 may also be mentioned in this connexion: 'Your ships will not, of course, be made a refuge for criminals.'[4]

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[1] For text of treaty see Hudson, op. cit., vol. iv, p. 2414.

[2] For text see Hudson, op. cit., vol. vi, p. 610.

[3] See also Arts. 2 and 3 of the Treaty of Montevideo of 1939, and Art. 17 of the Treaty of Montevideo of 1889.

[4] F.O. 35/92.

[5] F.O. 55/309.

The real problem consists in the difficulty of defining the notion of 'political crimes'. Some stress the element of motive, others that of purpose. Neither has an agreed solution yet been found in the matter of 'complex' crimes. The same applies to asylum in foreign territory, though diverse definitions have been attempted in extradition treaties. None of the Latin-American treaties on asylum in legations define 'political offence', but the Treaties of Montevideo of 1933 and 1939 attempted to prevent friction by providing that the state granting asylum should determine the conditions of its exercise.[5] They thus assimilated the position of legations a little to the position of a state deciding on the admissibility of a demand for extradition.

On the procedure of exercising asylum the four American treaties lay down the following principles, which are also supported by diplomatic practice:

(*a*) The local state must be immediately informed of the fact that asylum has been given.[6] British diplomatic practice shows that both the Guatemalan Foreign Minister in 1870 and his counterpart in Haiti in 1902 regarded such duty to give information as following from international usage.[7]

(*b*) The local state may require that refugees should be sent out of the country.[8] Safe-conducts for that purpose are usually granted. On the other hand, the state need not permit embarkation even if the legation concerned desires it. During the Spanish Civil War permission to evacuate the refugees in the foreign legations was given so reluctantly that the matter was twice brought before the Council of the League of Nations by the sheltering states.

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[1] *United States Foreign Relation Reports*, 1875, vol. i, pp. 84–9.

[2] Ibid., 1893, vol. iv.

[3] *British and Foreign State Papers*, vol. l, p. 803.

[4] Moore, op. cit., vol. ii, pp. 851–2.

[5] Treaty of Montevideo, 1933, Art. 2; Ibid., 1939, Art. 3.

[6] Ibid., 1889, Art. 17; Treaty of Habana, 1928, Art. 2; Treaty of Montevideo, 1939, Art. 4. With regard to the communication of names of those to whom asylum has been given, the last-mentioned treaty allowed an exception where 'grave circumstances . . . make it dangerous to the safety of refugees'.

[7] F.O. 15/147; F.O. 35/177.

[8] Treaty of Montevideo, 1899, Art. 17; Treaty of Habana, 1928, Art. 2, para. 3.

(*c*) Refugees must not be allowed, while sheltered, to perform acts contrary to public peace.[1] If evacuated they must not be permitted to return to the country as long as the rebellion is in progress.[2]

(*d*) Asylum must not be offered when unsolicited. That would be tantamount to undue interference in the political affairs of the state.[3]

(*e*) It is controversial whether asylum may be given in the private residences of ministers or consuls.[4]

III. *Adequacy of the present position in the matter of extra-territorial asylum*

The question may now be considered whether the present position of asylum in legations and ships is satisfactory from the point of view of the states concerned, and particularly of those who grant it. Their aim, it has been shown, is twofold: first, to act humanely; second, not to interfere unduly in the internal affairs of another state. It has been shown that there is, in this respect, no independent principle of law which would make lawful limited infringements of state sovereignty in favour of humanitarian considerations. The practice of states has not, in this respect, sanctioned the principle of humanitarian intervention in its widest form. In practice the claim of humanitarianism is satisfied only when it does not infringe the power of the local authorities, or, as in the case of usage, when it depends on their acquiescence. Nevertheless, the exercise of asylum is liable to strain the relations between the state whose representative gives asylum and the state on whose territory it is given.

At the height of a civil war it is easy for a government to suspect foreign legations of not merely sheltering, but of aiding, its political opponents. The British reply to the Uruguayan authorities on 10 April 1858 admitted that the practice of asylum must tend to compromise the foreign agents. This was so in Madrid in 1936 and 1937, as shown by the insinuations of the representative of the Spanish Loyalist Government before the Council of the League of Nations.[1] Moreover, it has occasionally been admitted that these suspicions are not always ill founded. The representative of the United States in Peru in 1867 was brutally frank; he described the career of a conspirator who, under shelter of a legation, had communicated with his fellow conspirators, and, immediately after being exiled, landed in Peru and led an army to Lima.[2] A dispatch from the British representative in Haiti in 1883 reported that the asylum of the Austrian Consulate had been similarly abused.[3] There is a touch of scepticism in the circular instructions to United States diplomatic officers in Latin America in 1930:

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[1] Habana Convention, 1928, Art. 2, para. 5; Montevideo Convention, 1939, Art. 5. See also *United States Foreign Relation Reports*, 1897, p. 582; ibid., 1913, pp. 854–5; *British and Foreign State Papers*, vol. xcv, p. 191 (for suggestions by an American diplomat on improving the exercise of asylum which stress this point).

[2] Montevideo Convention, 1939, Art. 7; Habana Convention, 1928, Art. 2, para. 4.

[3] *United States Foreign Relation Reports*, 1879, pp. 257–9. But see F.O. 55/309 for a case when the Argentinian Minister in Colombia offered asylum to a wealthy Colombian. It has been shown on p. 257 that the whole incident was irregular.

[4] The Treaty of Montevideo of 1939 permits it, but see an opinion of the Law Officers of 1873 to the opposite effect.

> 'The custom is justified publicly on humanitarian grounds, but in practice it is used primarily for the personal protection of conspirators planning a coup d'état, or for the government experiencing one.'[4]

It has also been suggested that knowledge that asylum will be granted tends to encourage insurrection. This led Secretary of State Fish in 1875 to stigmatize it as a 'wrong to the people where it is practised'.[5] It is difficult to brush aside the fact that political asylum constitutes interference in the internal political affairs of a nation,[6] and is thus contrary to accepted tenets of international law.

It has also never proved easy to distinguish between common criminals and political fugitives, particularly as political crimes are often punishable by the laws of the country. Thus in 1869[7] and 1875[8] in Haiti, and in 1911 in Paraguay,[9] to give only a few examples, the local Government claimed that the refugees were criminals, while the sheltering legations were emphatic that they were political refugees.

Asylum in accordance with modern United States doctrine escapes the difficulties mentioned. Neither criminals nor, as a rule, rebels are sheltered, for it is the duty of the Minister (or naval officer) to surrender any person sought by a governmental authority, whether on a criminal or a political charge. Shelter may only be given to fugitives from mob-violence. But even then a weak or a newly installed local Government may find it impolitic to admit that foreign representatives were justified in sheltering the scapegoats of the people or of the mob. Diplomatic tension between the two states concerned may result. Seeing that the primary objective of a legation is the establishment of good relations, the granting of asylum would thus seem to be not only extraneous to its purpose, but to run counter to it.

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[1] *Official Journal of the League of Nations*, 1937, pp. 101–2; *The Times* newspaper, 19 June 1939, p. 14.

[2] Moore, op. cit., vol. ii, p. 839.

[3] F.O. 35/118. The relevant passage is underlined.

[4] Hackworth, op. cit., vol. ii, p. 623.

[5] Padelford, *International Law and Diplomacy in the Spanish Civil War* (1939), p. 162.

[6] Cf. the opinion of Sir Robert Phillimore, the Queen's Advocate, of 22 December 1865.

[7] F.O. 35/77. The Haitian Foreign Minister wrote: 'Mme Alexis Nord n'est pas une réfugiée selon le sens légal du mot; elle est une prisonnière évadée d'une maison d'arrêts où une prévention . . . établie par les lois de la République l'avait fait placer.'

[8] *United States Foreign Relation Reports*, 1875, vol. ii, pp. 685–701.

[9] Scelle in *Revue générale de Droit international public*, 19 (1912), p. 628.

In fact diplomatic representatives have been unanimous in describing the practice as a 'source of discomfiture, trouble and responsibility'.[1] At the same time, because of the humanitarian considerations involved, states have not been prepared to abandon the practice. The British reply to the proposals of the United States on the subject of a possible abolition of asylum in 1870 put the matter well:

> '. . . although the practice is considered to be highly objectionable, some discretion must be left in urgent cases where, by giving time to the victorious party for reflection, lives might be saved; . . . it does not appear [to Her Majesty's Government] to be either necessary or humane voluntarily to abjure the practice.'[2]

Yet the fact remains that the present position is not satisfactory. The claims of humanitarianism and of state sovereignty are often irreconcilable. The representatives of other states are not the most suitable persons to protect the human rights of the subjects of the state to which they are accredited. The problems of asylum merely point to the necessity of finding a more suitable machinery of international supervision. Then the United States doctrine of extra-territorial asylum would work: the diplomatic representatives would be called upon to act only in a period of general lawlessness; while the local Government, if itself responsible for any persecution, would be called to account in a different quarter.

[1] Capt. Wyndham from Haiti, 6 May 1883 (F.O. Files).

[2] To Sir Edward Thornton, 24 May 1870 (ibid.).

TERMINATION OF DIPLOMATIC IMMUNITY

By R. G. JONES, Ph.D. (Cantab.)

In the present article it is proposed to consider the position of diplomatic representatives in the receiving state after the termination of their mission. In the first section, which is concerned with the head of the mission and his principal subordinates, it is intended to discuss the status of the diplomatic representative during the interval when, having presented his letters of recall, he is preparing to leave the receiving state. The second section deals with the position of minor employees. In the third section it is proposed to discuss the question of the termination of immunity as a result of the death of the representative.

I. *Heads of missions and principal subordinates*

(*a*) *Immunity between recall and departure*

Regardless of the reason for termination of his appointment, or of whether he remains in the diplomatic service of the sending state, an envoy retains his immunity from the local jurisdiction during the interval necessary for him to wind up his affairs and to depart for his home state. Even in cases resulting in the expulsion of an envoy for engaging in activities which threaten the safety of the state—in which event he may be placed under restraint in the public interest—his person remains inviolable. The nature and circumstances of this extension of immunity has been discussed at length by English courts in the well-known cases of *Musurus Bey* v. *Gadban*[1] and *In re Suarez*.[2]

In the former case Musurus Pacha, after serving as Turkish Ambassador to Great Britain since 1856, presented his letters of recall and handed the mission over to his successor on 7 December 1885. Two months later he returned to Turkey, where he died in 1890. In the following year his executor, Musurus Bey, came to England and brought an action against Gadban's executrix and executors for possession of certain bonds and other valuables deposited with Gadban by the testator. The defendants admitted having possession of the securities, but they entered a counterclaim for money which Musurus Pacha had borrowed from Gadban and his partner in 1873. Against this counterclaim Musurus Bey contended, *inter alia*, that collection was barred by the Statute of Limitations. He acknowledged that Musurus Pacha was immune from service so long as he remained Turkish Ambassador in England, but he maintained that Gadban could have met the requirements of the Statute of Limitations by suing out a writ against Musurus Pacha and keeping it renewed against the time when the privilege no longer operated. The Court rejected this contention. Smith L.J. held that while the Statute of Limitations might be a prima-facie answer, since the debt was contracted in 1873 and the claim was not raised until 1892, this was an exceptional case. No valid writ could have been issued while Musurus Pacha was an ambassador because, in the words of Best C.J. in *Douglas* v. *Forrest*,[1] 'no one has a complete cause of action until there is somebody that he can sue'. Even if a writ had been sued out, continued the learned judge, it could not have been renewed periodically because this is permissible only when there is evidence that reasonable efforts have been made to serve the writ and when there is a defendant capable of being served and sued. Smith L.J. rejected a further contention on the part of Musurus Bey that the retiring Ambassador could have been sued during the two months he remained in England after presenting his letters of recall. In his opinion the matter had been decided in *Magdalena Steam Navigation Company* v. *Martin*,[2] in which Lord Campbell held that there can be no execution against an ambassador either while he is accredited or after his recall if he remains in the receiving state for only a reasonable time. If this part of Lord Campbell's decision was a mere dictum, said the learned judge—and he did not think that it was—it was nevertheless good sense and good law. Davey L.J. added that there was nothing from which the Court could infer that Musurus Pacha remained in England longer than 'a reasonable time'.[3] He was therefore of opinion that the privilege extended through this interim period, as it would be 'almost an outrage of common sense' to say that the privilege ceases the moment an ambassador presents his letters of recall. Indeed, he said, while handing over the affairs of the embassy to his successor the retiring ambassador is still engaged in the business of his sovereign.

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[1] [1884] 2 Q.B. (C.A.) 352, at p. 354.

[2] [1917] 2 Ch. 131; [1918] 1 Ch. 176.

On the other hand, *In re Suarez*[4] shows that a person who has ceased to exercise diplomatic functions is not protected from actions indefinitely. This was a beneficiary's action against Pedro Suarez, Bolivian Minister to Great Britain, as administrator. When the originating summons was issued in January 1914, Suarez agreed to accept service and the case proceeded to judgment. Subsequently, when Suarez failed to make payments to the beneficiary as ordered by the Court he received a summons under the Courts (Emergency Powers) Acts, 1914–16, for leave to proceed to execution. At this point Suarez raised the question of whether, notwithstanding his submission to the jurisdiction, any writ could be sued out or issued. Eve J. held that it could not. The proper course, the learned judge concluded, was to make no order on the summons other than that it should stand over generally, with liberty to restore should the defendant cease to hold an office conferring immunity.

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[1] 4 Bing. 686, at p. 704.

[2] (1859), 2 El. and El. 94; 121 E.R. 36.

[3] [1894] 2 Q.B. (C.A.) 352, at p. 362.

[4] [1917] 2 Ch. 131; [1918] 1 Ch. 176.

Subsequently, when Pedro Suarez ceased to be Bolivian Minister to Great Britain, the order was restored. On 21 September 1917 the solicitors to the plaintiff received a letter from the Foreign Office stating that following a report from the British Chargé d'Affaires at La Paz that the Bolivian Government had terminated the appointment of Pedro Suarez as Minister to Great Britain, his name had been removed from the Diplomatic List. The plaintiff then obtained on 23 October an order giving leave to issue a writ of sequestration, against which Suarez appealed. Dismissing any idea of an extension of immunity, Warrington L.J. stated that the action had been effectively prosecuted and that the Court, notwithstanding the ambassadorial character of the defendant, 'had jurisdiction to make all the orders up to and including those on which the order for issue of the writ of sequestration was founded.'[1] The latter, as the order appealed from, he held to have been properly made when the privilege no longer existed. He then alluded to the fact that on 5 March the defendant had been personally served with an order to attend four days later for examination as to his means. This order had been made in the presence of his solicitors on 7 March. The following day he disappeared. If there had been an extension of immunity, reasoned Warrington L.J., it ended long before 23 October,[2] when the plaintiff made the present application, and thus the defendant no longer enjoyed diplomatic immunity.

American practice shows a similar acceptance of the principle of extended immunity for a retiring diplomat. This is so despite what seems to have been a temporary aberration during the uncertain conditions of the Civil War. In 1865 the Salvadorean Minister at Washington, after his recall at the request of the American Government, was imprisoned in connexion with an alleged violation of the United States neutrality laws. There is no record of prosecution, but the possibility that the detention was more than preventive is suggested by the fact that the papers in the case were referred to the Attorney-General. However, that official gave an opinion that the alleged facts did not constitute an indictable offence.[3] A more recent attitude on the part of the United States is manifested in a series of incidents and statements beginning in 1906, when the American Minister to Venezuela informed the Minister of Foreign Affairs of that country of a decision by the French Government to discontinue diplomatic relations with Venezuela, adding that he had been instructed to take charge of the property of the French Legation at Caracas. Four days later, when the French

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[1] At p. 197.

[2] This was itself a month after the Foreign Office certified that Suarez was no longer on the Diplomatic List.

[3] Moore, *Digest of International Law*, vol. iv, pp. 500 and 667.

Chargé d'Affaires went aboard a French vessel in the La Guaira harbour, he was detained there by Venezuelan authorities and obliged to sail with the ship before receiving his passports. In reply to a protest from the Diplomatic Corps in Caracas, the Minister of Foreign Affairs contended that the envoy lost his diplomatic character upon the receipt of the note from the American Minister. This prompted a second remonstrance from the Diplomatic Corps. In relation to the incident, Mr. Root, who was at that time the American Secretary of State, said that 'under international law, diplomatic immunities . . . attach to a diplomatic agent, even though his powers . . . may have been suspended or terminated . . . so long as he may be within the jurisdiction of the state to which he has been accredited, a reasonable time for his withdrawal therefrom being accorded.'[1]

Two years later the Venezuelan Government, by this time alone in its refusal to grant immunity subsequent to the end of the diplomatic mission, indicated its acceptance of the principle. The American State Department, following upon a rupture in diplomatic relations between the United States and Venezuela in 1908, instructed the American Minister at Caracas to apply not only for his passports but also for a safe-conduct until his departure. In reply to his request the Venezuelan Foreign Minister gave assurances to the envoy that his immunity would be respected up to the time of embarkation.[2] Subsequent to the rupture of diplomatic relations, the United States Government placed American interests in Venezuela under the care of the Brazilian Minister to that state. In a note to the Brazilian Ambassador to Washington at this time, the State Department amplified the position taken by Secretary Root. It said: 'immunity inherent in the persons of diplomatic agents extends for a reasonable time after the cessation of diplomatic functions in order that they may complete their arrangements to leave the country.'[3]

It is, of course, clear that to the same extent that he may waive his immunity while serving in his official capacity, a diplomat may voluntarily submit to the local jurisdiction during the interval between the termination of his duties and his departure. Thus in 1934, when proceedings were brought against the Panamanian Minister resident in Argentina, the defendant did not rely upon diplomatic immunity. He resigned his office before the trial, appeared before the judge, and expressed willingness to submit to process. The question of his status arose when the judge referred the proceedings to the Supreme Court, believing that under Argentine law it had exclusive jurisdiction. The Supreme Court ruled that the court of the first instance should take jurisdiction.[1] Adopting the reasoning of the Fiscal,[2] it pointed out that a diplomat may waive immunity with the consent of his Government.[3] Moreover, the Court continued, the privilege of the defendant ended with his resignation, since immunity is accorded to a diplomat in virtue of his office and is based upon his position at the time of the proceedings. It is submitted that the latter contention, which is contrary to the accepted principle of extended immunity, is a mere dictum, for the controlling point appears to have been the voluntary submission to the jurisdiction on the part of the Panamanian Minister.

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[1] Minister Russell to Secretary Root, 21 January 1906, and Mr. Root to Mr. Russell, 2 April 1906 (Hackworth, *Digest of International Law*, vol. iv, § 387, p. 457).

[2] However, the Foreign Minister made a point of the fact that the Venezuelan Government had no complaint against the American Minister personally.

[3] Acting Secretary Adee to Ambassador Nabuco, 23 July 1908 (Hackworth, op. cit., vol. iv, § 387, p. 458).

Since circumstances vary with the case, it is impossible to set precise limits upon the time necessary for a person who has ceased to exercise diplomatic functions to complete his preparations for departure. Normally the matter can be arranged by consultation between the officials concerned. After the rupture in diplomatic relations between the United States and Turkey in April 1917, the Turkish Chargé d'Affaires in Washington expressed a desire to remain in the United States temporarily because of ill health; the receiving state made no objection.[4] Similarly, upon the rupture of Brazilian diplomatic relations with the Axis Powers which preceded the entry of that country into the Second World War, both the German and Italian Ambassadors to Brazil requested and received permission to postpone their departure.[5] Ultimately, however, it would appear that the government of the receiving state must be the judge of how long the period of grace is to continue. This view was supported by Mr. Fish, the American Secretary of State in 1871, with reference to developments after the request by the Government of the United States for the recall of M. Catacazy, the Russian Minister at Washington. Following the request, the Minister was instructed by his Government to turn the legation over to another official; but, instead of being ordered to return immediately, he was directed to join the entourage of a Russian dignitary making a tour of the United States and to return with the party. Secretary Fish accepted this as a practical compliance with the request for recall and suspended the issuance of passports to the former envoy.[6] Nevertheless, he made it clear to General Gorloff, who had been left in charge of the Russian Legation, that if the former Minister abused his privilege by undue lingering in the country his immunity would be forfeited.[1]

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[1] *In re Holguin* (1934), *Annual Digest of Public International Law Cases*, 1933–4, Case No. 163.

[2] An opinion by the Fiscal, known as a *dictamen*, 'may be regarded as being half-way between an Attorney-General's opinion and the report of a Master in Chancery' (*Annual Digest*, 1919–22, p. 107, Note).

[3] The report does not make it clear whether the Panamanian Government consented to the renunciation of immunity.

[4] Hackworth, op. cit., vol. iv, § 387, p. 457.

[5] *The New York Times*, 8 May 1942, p. 8, col. 3.

[6] Moore, op. cit., vol. iv, § 639, pp. 502–3.

British practice, as suggested by an early opinion of the Law Officers of the Crown,[2] seems to be in accordance with this view. Furthermore, the Law Officers intimated that a former diplomat might be called upon to justify any stay in the country beyond a time which might prima facie be deemed reasonable. The question arose in 1808 when the Court of Common Pleas issued a writ against Count Pfaffenhoffen, who had formerly been attached to an Austrian mission to Britain. Upon receipt of a complaint from Count Pfaffenhoffen, the Foreign Office referred the question to the Law Officers of the Crown. In their opinion, the Law Officers advised that whether the complainant was entitled to protection depended not only upon whether he had ever held a diplomatic position, but whether he was divested of its privileges by the termination of the mission to which he had been attached. They passed over the first question on the ground that even if the Count had enjoyed a diplomatic status it was admitted that it had ceased some time previously. In view of the circumstances, the Law Officers concluded, any protection which might have extended to the claimant ceased with the end of the mission unless he could make it appear that his continued stay in England had been involuntary and had arisen out of an inability to return to his own country. Upon the latter point, the Law Officers believed that considerable doubt might arise as to the sufficiency of the reasons the claimant put forward to justify his delay in returning to Austria, though they stated that such questions could properly be determined only by the Court which issued the writ and to which Count Pfaffenhoffen would have to apply for redress.

A similar attitude was adopted by the Law Officers three decades later with reference to claims against Prince Soutzo, the former Chargé d'Affaires of the Greek Legation in London. When requesting the opinion of the Law Officers,[3] the Foreign Office explained that the envoy, when still in his official capacity, had obtained protection from an earlier action brought by the same claimant. In the present instance the claimant was asking whether the Prince was still with the legation and, if not, if another action could be instituted. The Foreign Office added that in fact his diplomatic connexion had ceased. The Law Officers advised[4] that if Prince Soutzo, rather than preparing for a return to Greece, was remaining in England as a private individual, he could not expect immunity. They proceeded to say, however, that though the Foreign Office might properly inform the claimant accordingly, it would not be advisable to intimate an opinion on the right to bring action for a debt contracted while the prince was still a public minister.

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[1] Moore, op. cit., § 666, p. 668.

[2] Opinion of 3 May 1808 (F.O. 83/2230).

[3] Draft, Foreign Office to the Law Officers of the Crown, 9 September 1839 (F.O. 83/2286).

[4] Opinion of 10 September 1839 (F.O. 83/2286).

The material dates of the above case are of interest. No mention is made of when Prince Soutzo actually ceased to be Greek Chargé d'Affaires. He had been accorded diplomatic immunity on 27 June 1839. The claimant's request for information relative to a possible change in his status was dated 31 July 1839, and the Law Officers advised the Foreign Office on 10 September 1839 that he could be presumed to have ceased to enjoy extended immunity unless, it would appear, he could justify his continued stay in England. The attitude of the Law Officers apparently indicates that the intentions of the former diplomat, rather than a specific time interval, should be the governing factor in determining when extended immunity no longer prevails.[1]

Austria seems to be the only state which has set an approximate limit upon the time to be allowed a diplomat in winding up his affairs. In 1934 a civil action was brought in Vienna against the former German Minister to Austria. When the defendant entered a plea to the jurisdiction, the Court requested a statement from the Ministry of Justice respecting his status. This department, in conjunction with the Foreign Office, replied that the former Minister was still privileged. In a *note verbale* of 8 May 1935, the American Legation in Vienna was informed, in relation to the above case, that the period of extended immunity in Austria was normally considered to be a year. It was further stated that the Minister in question, who had not removed his furniture from Vienna, had not left Austria definitively.[2]

(*b*) *Status after definitive termination of mission*

Modern law recognizes diplomatic immunity as procedural, not substantive. It follows that, once the competence of the jurisdiction has been established by termination of the diplomatic mission (and after the person concerned has been accorded a reasonable extension of his privilege while preparing to leave for home), actions may be entertained not only with regard to subsequent matters but also to any unofficial acts which took place while the privilege was in effect. As stated by Lord Ellenborough in

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[1] It may be noted that the readiness with which the Law Officers suggested that an individual might be supplied with Foreign Office information relative to the current status of a former diplomat is not indicative of a general rule. Such information may not have been universally withheld, but inquiries seem usually to have been treated with reticence. Thus when a firm of solicitors, in connexion with a pending action, sought information in 1837 regarding the material dates of arrival and departure of Prince Stahremberg, sometime Austrian Ambassador to Great Britain, the King's Advocate advised the Foreign Secretary that it had not been usual and would not be expedient to search the Foreign Office records to supply information connected with causes under trial, upon a mere *ex parte* application (Opinion of the King's Advocate, 19 June 1837, F.O. 83/2279).

[2] The American Chargé d'Affaires *ad interim* in Austria (Klieforth) to the Secretary of State (Hull), 16 May 1935 (Hackworth, op. cit., vol. iv, § 402, p. 538).

Marshall v. *Critico*,[1] once he is divested of his privileged character a diplomat is subject to the local jurisdiction on the same basis as any other alien. Thus in 1930 a Dutch court rejected a plea to its jurisdiction by a former Portuguese Minister to the Netherlands who based his claim for immunity, raised nearly two years after the end of his mission, on the ground that on the material dates he was serving in a diplomatic capacity. The Court held that 'immunity from civil jurisdiction in the State of his diplomatic mission ends for the diplomatic representative of a foreign power with the end of his mission, except for the time necessary to settle his affairs'.[2] Lord Hewart emphasizes this same point in a dictum in *Dickinson* v. *Del Solar*.[3] After distinguishing between immunity from the law and exemption from process, he proceeded to consider the question (which, however, did not arise and was not decided) of whether execution could issue against a defendant on the judgment. Even if execution could not issue while the defendant remained a diplomatic agent, he suggested, presumably it might issue when the agent ceased to be a privileged person. This procedure, it will be noted, was actually followed in *In re Suarez*, *supra*.

It is clear that a former diplomat retains no immunity if he continues to reside permanently in the receiving state. Some opinions of the Law Officers of the Crown relating to Venezuela reveal interesting aspects of the question of extended immunity for a retiring diplomat. On 22 November 1858 the Foreign Office informed the Queen's Advocate of the somewhat unusual circumstances surrounding the resignation of Mr. Bingham, Her Majesty's Chargé d'Affaires and consul-general in that Latin-American republic.[4] Following settlement of differences with Venezuela, the British Government had changed its diplomatic representatives. In due course Mr. Bingham notified the Venezuelan Government of his recall on 31 August, and the following day his successor presented his credentials. Complications developed at this point, for the Foreign Office had reason to believe that Mr. Bingham intended to settle in Venezuela. He was known to be in disfavour with the existing Government, which was said to suspect with strong reason that he was assisting a revolutionary faction. In addition, it transpired that he was in financial difficulties, and that his creditors contemplated bringing proceedings against him in the Venezuelan courts. In view of the situation, the Foreign Office asked for the opinion of the Queen's Advocate as to whether Mr. Bingham enjoyed protection from interference by the Government of Venezuela on political grounds. A second question was concerned with whether any privilege remained to protect him from arrest and imprisonment at the suit of creditors in Venezuela.

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[1] 9 East. 444.

[2] *Bank of Portugal* v. *A. De Santos Bandeira* (Holland, 1930, District Court of the Hague), *Annual Digest*, 1929–30, Case No. 201.

[3] [1930] 1 K.B. 376.

[4] Draft, Foreign Office to the Queen's Advocate, 22 November 1858 (F.O. 83/2401).

The Queen's Advocate replied[1] that, on the facts, Mr. Bingham could not rely on diplomatic immunity indefinitely, though in a case 'of such rare occurrence and surrounded by so many peculiar circumstances' it was difficult to lay down specific rules in advance. Clearly, he perceived, Mr. Bingham could not continue to claim the diplomatic privilege if he remained in Venezuela voluntarily and for private purposes for an indefinite time not only after his formal recall but subsequent to the appointment of his successor. It was, nevertheless, true that a reasonable extension of immunity while making arrangements for his departure was in order, but such a period could not be extended at his discretion. Since the period already elapsed, from 31 August to 22 October (the date of the latest advices from Venezuela), was not prima facie unreasonable, there seemed to be no need for immediate action. At the same time the Queen's Advocate suggested that Mr. Bingham might be approached with the view of obtaining a statement as to his future plans. If he intended to remain in Venezuela, the Foreign Office might intimate that the British Government could take no official interest in his future treatment at the hands of the Venezuelan authorities as an unprivileged individual.

With regard to the question of liability to suits at the hands of private individuals, the Queen's Advocate said he did not believe Mr. Bingham could count on any privilege other than an extension during a reasonable period while making plans to leave the receiving state. However, the question of whether he was at the moment liable to arrest for a debt contracted while still accredited as minister admitted of some doubt. It was presumed, continued the Queen's Advocate, that there was no intention of making him legally responsible for any of his official actions as the accredited British representative.

The Foreign Office sought additional advice from the Law Officers of the Crown.[2] In particular, the Law Officers were asked how far a British diplomat, subsequent to the termination of his official functions, is liable to process if he remains in the receiving state in a private capacity. Special emphasis was placed on the question of liability for debts contracted while the diplomatic appointment was still subsisting. In their more exhaustive discussion of this point, the Law Officers concurred with the earlier opinion of the Queen's Advocate.[3] They considered immunity a privilege accorded to diplomatic agents solely in their public character. Accordingly the principle *cessante ratione cessat lex* fully applied. International law conferred no exemption from the jurisdiction of the receiving state if a former diplomat chose to remain there. The fact that he had once been accredited in a diplomatic character was said to be immaterial if he commits an offence or incurs any liability after reverting to a private status.

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[1] Opinion of the Queen's Advocate, 29 November 1858 (F.O. 83/2401).

[2] Draft, Foreign Office to the Law Officers of the Crown, 2 December 1858 (F.O. 83/2401).

[3] Opinion of the Law Officers of the Crown, 18 December 1858 (F.O. 83/2401).

The Law Officers then proceeded to express an opinion with respect to the liability of a retired diplomat for official acts. His amenability to the local jurisdiction was regarded as absolute, but they emphasized the duty of the local tribunals to recognize immunity for official acts. Thus, although a former diplomat might not object in the first instance to the ordinary jurisdiction, if it were established at the hearing that the acts in question were done exclusively in his diplomatic character, within the scope of his duty, or had been previously commanded or subsequently ratified by his Government, he should be absolved of responsibility. Such facts, once established, should constitute a complete defence, and a failure on the part of a tribunal to recognize that defence might properly be made the subject of formal international remonstrance.

Hesitation in 1846 and 1847 on the part of the Mexican Government in replacing M. Murphy, its Minister in London, led to emphasis being placed on the point that presentation of letters of recall rather than the simple fact of appointing a successor governs the termination of a ministerial appointment. In December 1846 M. Murphy's solicitors wrote the Foreign Secretary that following an order of the Mayor's Court in London property owned by the Minister had been attached.[1] They requested a statement that, having regard to diplomatic immunity, M. Murphy was exempt from process. Lord Palmerston observed that, according to unofficial sources, the Mexican Government had appointed another minister some time before, but there was nothing to indicate that a change of representatives had taken place. For this reason he concluded that M. Murphy was still the accredited Mexican Minister,[2] and the solicitors were so informed.[3] A subsequent plea from the Minister himself[4] resulted in a Foreign Office request to the Home Office that measures be taken to safeguard his diplomatic privilege.[5] Three months later M. Murphy informed Lord Palmerston that since his successor had presented his credentials another action might be forthcoming. Calling attention to the extension of immunity provided by international law, the former Minister sought continued protection up to the time of his departure.[6] The matter was referred to the Queen's Advocate,[7] who supported the claim. In his opinion, under international law a foreign minister continues to be invested with immunity after his recall during any reasonable time between that date and his leaving the country.[8]

[1] Dawes and Sons to Viscount Palmerston, 11 December 1846 (F.O. 83/1660).

[2] Office Memorandum, 12 December 1846 (F.O. 83/1660).

[3] Draft, Foreign Office to Dawes and Sons, 14 December 1846 (F.O. 83/1660).

[4] M. Murphy to Viscount Palmerston, 17 December 1846 (F.O. 83/1660).

[5] Draft, Letter of 18 December 1846 (F.O. 83/1660).

[6] Letter of 29 March 1847 (F.O. 83/1660). [7] Draft of 30 March 1847 (F.O. 83/1660).

[8] Opinion of the Queen's Advocate, 31 March 1847 (F.O. 83/1660).

French tribunals have readily assumed jurisdiction in controversies relating to formerly accredited diplomats who continue to live in France. Thus in 1899 the Correctional Tribunal of the Seine disallowed a plea to its jurisdiction entered by one Christidis, a former secretary of the Greek Legation in Paris, some six months after he had been replaced.[1] Seven years earlier, however, the same Court ruled that an action would not lie against a former diplomat if the proceedings were instituted during his period of privileged employment. In *Foucault de Mondion* c. *Tcheng-Ki-Tong*,[2] the plaintiff was attempting to collect a debt from the former first secretary of the Chinese Legation in Paris. Proceedings had been begun a month before Tcheng-Ki-Tong left the legation. For this reason the Court declined to take jurisdiction. Undeniably, it declared, privilege ceases with the termination of an appointment, but immunity still applies with respect to an action while that privilege was still in force.

Two Swiss decisions indicate that this principle does not extend to a new and separate action arising out of circumstances relative to which a court, because of the defendant's privilege, previously held itself competent. In 1926 the court of first instance in Geneva refused to entertain a paternity suit against the Jugoslavian delegate to the League of Nations.[3] Subsequent to the birth of the child and the replacement of the delegate by his Government the plaintiff brought a new action before the same court. This time the court declared itself competent.[4]

In some countries the provisions of the local law relative to actions against foreigners living abroad may be relied upon after a former diplomat has left the receiving state. Thus in 1940 the High Court of Eire allowed an action against an insurance company, indemnifiers of a former American Minister to Eire who had returned to the United States, in conformity with an Irish statute providing for suit against individuals currently abroad.[5] The plaintiff was injured while riding in an omnibus when it collided with the Minister's motor-car. In May 1939 an action was brought against the Minister, on whose behalf some six months later (after he had relinquished his post and returned to the United States) a conditional appearance was entered without prejudice to the question of diplomatic immunity. For some reason, although no move to set aside the proceedings had been made, the suit was discontinued. However, a month later the plaintiff asked the Court to issue proceedings against the company in accordance with provisions of the Irish Road Traffic Act laying down certain conditions under which recovery could be sought against insurers if a policy-holder was abroad. It was submitted that the ministerial privilege did not convey immunity from legal responsibility and that, in any event, the immunity ceased with the termination of the Minister's term of office. The Court granted this application. Maguire J. accepted the reasoning of Lord Hewart in *Dickinson* v. *Del Solar*[1] with regard to diplomatic privilege, saying that it consisted only in the exemption from local jurisdiction, not from legal responsibility. Although it was true, said the Court, that a minister of a foreign Power could not be sued while in Eire, the exemption ceased when he left the country.

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[1] *Christidis* c. *Consorts Verissi* (18 February 1899), *Clunet, Journal du Droit international*, 28 (1899), p. 369.

[2] (11 February 1892), *Clunet*, 19 (1892), p. 429.

[3] *V——* c. *D——* (Geneva, 10 June 1926), *Clunet*, 54 (1927), p. 1175; *Annual Digest*, 1925–6, Case No. 247.

[4] *V—— et Dicker* c. *D——* (Geneva, 29 March 1927), *Clunet*, 54 (1927), p. 1179.

[5] *Norton* v. *General Accident, Fire and Life Assurance Company* (1940), *Annual Digest*, 1938–40, Case No. 163.

French decisions indicate a similar trend, though the position is not entirely clear. There is some indication that French jurisprudence accords permanent immunity for activities related to the conduct of the mission,[2] with a sometimes liberal interpretation of what actions come within this category. In *Salm* v. *Frazier*,[3] the Court of Appeals of Rouen refused in 1933 to facilitate execution of a judgment handed down by an Austrian court against a former American Chargé d'Affaires in Vienna. Frazier had been accredited by the United States as Commissioner for Austria on 13 September 1920. After his subsequent appointment as Chargé d'Affaires, he served in that capacity until his resignation took effect on 22 July 1922. Following this resignation, the plaintiff obtained a judgment against him in the Austrian courts relative to certain real-estate transactions Frazier had entered into while Commissioner. In the present action, eleven years after Frazier resigned his diplomatic post, the plaintiff requested the French Court to issue an execution on the Austrian judgment. The Court held that although immunity may attach to the diplomatic office and cease to protect an individual after he severs his official connexion, his liability is limited to his subsequent activities. A former diplomat, in the opinion of the Court, cannot be held accountable for actions contemporaneous with his mission and connected with it, for this would 'render illusory the very principle of immunity'.

Where there is clearly no relation between the cause of action and official duty, French courts assume jurisdiction after a diplomat ceases to hold office. Thus in *Laperdrix and Penquer* v. *Kousouboff and Belin*,[4] the Court of Appeal of Paris in 1925 assumed jurisdiction in an action brought against Belin, a former secretary of the American Embassy in Paris, with respect to injuries sustained by the plaintiffs in an accident with the secretary's motor-car. The accident occurred on 21 September 1923; Belin's duties at the embassy ended about a month later, whereupon the plaintiffs brought the action. In assuming jurisdiction, the Court held that immunity, created in the interest of governments and not of diplomats, does not extend beyond the time when the office of the diplomat comes to an end. Otherwise, it said, there might be created in favour of diplomatic agents a kind of prescription and an unlimited irresponsibility. Support for this view may be found in numerous projected codes which show a tendency towards the denial of extended immunity in connexion with acts unrelated to the diplomatic function.[1]

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[1] [1930] 1 K.B. 376.

[2] See Noel Henry in *Clunet*, 54 (1927), p. 1184.

[3] *Annual Digest*, 1933–4, Case No. 161.

[4] Ibid., 1925–6, Case No. 241.

A recalled envoy, after leaving the receiving state, can expect no immunity if he returns in an unofficial capacity. That he may have remained in the diplomatic service of his own country is immaterial. This point is emphasized in an opinion of the Queen's Advocate in 1840.[2] The British Chargé d'Affaires at Munich had been transferred while absent on leave. Though there were no public grounds for a return to Munich, he subsequently visited that city at a time when his successor was fully installed in office. During his stay, proceedings were brought against him by the Bavarian authorities. The Queen's Advocate advised Lord Palmerston that under the circumstances the former Chargé d'Affaires was not entitled to diplomatic privilege and that there were no grounds to justify interference by the British Government on his behalf.

There is some indication, however, that this rule of subjection to jurisdiction upon the termination of diplomatic immunity will be relaxed upon suitable occasions. In 1873 M. Andrada, former Brazilian Chargé d'Affaires in London, returned to England some time after his official departure. He was then presented with a demand for the payment of taxes which were alleged to have accumulated on his residence (which was also used as his legation) during his privileged occupancy. While disclaiming any wish to evade payment if the demand were valid, M. Andrada, in inquiring of the Foreign Office regarding his position,[3] pointed out that when he first assumed his diplomatic post he had been assured that he was not liable for taxes. The Foreign Office informed him[4] that the Collector of Taxes for the parish in question had been directed to drop any proceedings for the recovery of taxes which fell due up to the time when he had ceased to be Brazilian Chargé d'Affaires. A year before it had been established that a landlord was not liable for accumulated taxes upon the departure of a privileged tenant. When General Brice, the retiring Haitian Minister, left England in 1871, the Vestry of Kensington called upon a Mr. Bryant, owner of the house which the General had occupied both as his residence and as the Haitian Legation, to pay the rates from the payment of which his former tenant had been acknowledged to be exempt. Supporting a protest from Mr. Bryant, the Foreign Office pointed out in a letter to the Home Office[1] that General Brice had been Haitian Minister throughout his occupancy, that rates should not have been levied on the house during this period, and that an adjustment had apparently been made in the rent on this account. For these reasons the Foreign Office suggested that it would hardly be fair for rates to be levied retrospectively upon the landlord. Upon receipt of this communication, the Home Office took steps to have the demand withdrawn.[2] In assessing the value of these precedents, it must be remembered that upon occasion the diplomatic privilege with respect to taxes has been characterized as a genuine exemption rather than mere freedom from process, and that in both instances the houses in question had served not only as the residence of the Minister but also as the legation. Moreover, the fact that in neither case did support of the principle of immunity involve a possible loss to an individual claimant may have been treated as a relevant consideration.

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[1] See Art. 16 of the Resolution of the Institute of International Law Concerning Diplomatic Immunities, New York, 1919; *Annuaire*, XXXV, vol. II, pp. 307, 310; Arts. 20 and 22 of the Convention on Diplomatic Officers adopted at Havana on 20 February 1929, at the Sixth International Conference of American States (*Report of the Delegates of the United States of America to the Sixth International Conference of American States* (1928), p. 207).

[2] Opinion of the Queen's Advocate, 4 January 1840 (F.O. 83/2232).

[3] Letter of 7 August 1873 (F.O. 83/1661).

[4] Foreign Office (Hammond) to M. Andrada, 8 August 1873 (F.O. 83/1661).

II. *Subordinate members of the Diplomatic Mission*

Modern practice accords no immunity to a domestic servant in a diplomatic mission beyond the period of his employment. Since the *raison d'être* of his exemption—the convenience of his employer—no longer obtains, he becomes subject to immediate action before the local courts.[3] This principle was acted upon in Germany in 1899, when a Frenchman in the service of the Spanish Ambassador to Berlin assaulted a fellow servant. The court declined jurisdiction because of the status of the accused. After the offender had ceased to work at the embassy, proceedings were re-instituted. The Court of Appeal took cognisance of the offence. It said that since the barrier to the jurisdiction no longer existed there were no grounds for failing to recognize the competence of German courts.[4] Commenting on this case, Sir Cecil Hurst suggests that the possibility of inconvenience to the receiving state is diminished by the ability of an envoy to place a servant immediately before the local jurisdiction by dismissing him.[5] Though not inferring that this course is obligatory, he believes that there should be no refusal without compelling reasons.[1] Sir Cecil refers only to nationals of the receiving state, but the device could be utilized for all employees—including, as will be seen in *Rex* v. *Kent*,[2] subordinate officials as well as servants.

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[1] Draft of 2 April 1872 (F.O. 83/1661).

[2] Home Office to the Vestry Clerk of Kensington, 4 April 1872 (F.O. 83/1661).

[3] See Hurst, 'Les Immunités diplomatiques', in *Recueil des Cours*, 1926 (ii), pp. 115–245, at pp. 203–4.

[4] *Clunet*, 29 (1902), p. 46; Moore, op. cit., vol. iv, § 665, p. 662.

[5] *Recueil des Cours*, loc. cit., p. 203.

Immediate cessation of immunity in the case of servants was emphasized in 1939 by the police court of the District of Columbia in *District of Columbia* v. *Paris*.[3] The defendant, an American citizen, was charged with ten traffic violations over a two-year period. He pleaded guilty to the last offence, but claimed privilege for the others on the ground that at the material times he was employed as butler by the Japanese Ambassador. During this period the defendant had been included on the list furnished to the United States Marshal in the District of Columbia by the State Department. The court assumed jurisdiction. No objection, said the judge, could be entertained with respect to a former member of a foreign diplomatic suite. He added that a national of the receiving state was not entitled to extended immunity for winding up his affairs. Referring to *Dickinson* v. *Del Solar*[4] and the *Harvard Research*,[5] the court pointed out that immunity is procedural rather than substantive. Whenever the possibility of interference with the freedom of his diplomatic employer—the only basis for a servant's immunity—is eliminated the jurisdiction of the territorial sovereign may be exercised. The court emphasized that although members of a mission enjoy an extension of immunity until they have had a reasonable time to return home, this does not apply to a national of the receiving state.

Prior to *Rex* v. *Kent*[6] English courts had not been called upon to decide the status of a former diplomatic employee. In that case—a criminal prosecution under the Official Secrets Act—the defendant was a minor official of the American Embassy whose immunity had already been waived with the consent of his Government. The accused contended it was impossible for his superior to surrender the privilege on his behalf, and that his immunity must be respected while he prepared to leave for home. He relied upon a statement in Oppenheim[7] which cited *Musurus Bey* v. *Gadban*[8] and *In re Suarez*.[9] The court held that those cases did not govern a situation where the person claiming privilege had been dismissed from his post. Immunity was said to cease from the moment of waiver by the ambassador or, *a fortiori*, by his Government. Since then, the court said, the cloak of the ambassador no longer covers the individual and he becomes liable to any process to which ordinary people are subject.

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[1] *Recueil des Cours*, 1926 (ii), p. 212.

[2] [1941] 1 K.B. 454; *Annual Digest*, 1941–2, Case No. 110.

[3] *A.J.* 33 (1939), p. 787; *Annual Digest*, 1939–40, Case No. 169.

[4] [1930] 1 K.B. 376.

[5] *A.J.*, Suppl., 26 (1932), p. 137.

[6] [1941] 1 K.B. 454; *Annual Digest*, 1941–2, Case No. 110.

[7] *International Law*, vol. i (5th ed. by Lauterpacht), p. 636, note.

[8] [1894] 2 Q.B. 352.

[9] [1918] 1 Ch. 176.

This decision, the first pronouncement on the point by an English court, is similar to an opinion given by the Law Officers of the Crown more than a century before. In that earlier instance a Sir Robert Peat, committed to prison for non-payment of taxes, claimed immunity on the ground that during the material period he had been librarian at the Portuguese Embassy in London. The Law Officers considered it unnecessary to discuss the validity of the claim, since even if he had enjoyed immunity while so employed it was clear that any connexion with the embassy had come to an end. In the view of the Law Officers, the protection of the Statute of Anne did not imply an extension of immunity in the case of a diplomatic servant.[1] While the Law Officers subsequently advised the Foreign Secretary that in this instance he might be justified in remitting the penalty as an act of grace,[2] the principle of their former opinion remains unimpaired.

Dicta in both the British and American decisions previously discussed indicate that, in cases other than following upon dismissal, minor officials in the diplomatic suite are accorded an extension of immunity in the same way as the head of the mission. This suggests a different basis for the privileges of a minor official who in some degree is an instrument of governmental policy, and a domestic servant to whom immunity is accorded only to insure the convenience of his employer. That the services of a minor official are the concern of his Government as well as his superior is emphasized in instructions issued by the Foreign Secretary in 1833 and again in 1837 to British ministers abroad.[3] The Foreign Secretary expressed concern over a growing tendency to consider secretaries as 'absolved . . . during the presence of the Ambassador or Envoy, from the actual performance of the duties of the Mission'. He believed that this practice, which was contrary to Crown instructions, not only detracted from the dignity of the mission but deprived the secretaries of an opportunity to acquire a knowledge of diplomatic practice. Thus, he said, secretaries must be allowed to become 'practically and regularly acquainted with the nature of those higher duties which in the course of time they will probably be called upon to perform'.

III. *The question of immunity on termination of office as a result of death*

While there exists a substantial body of practice with regard to this subject, it is not easy to deduce a general principle as to the position of the family and property of a deceased envoy. Judicial decisions and opinions of the Law Officers of the Crown alike reveal a tendency against sweeping extensions of immunity. Thus, in 1815, the Law Officers took a cautious view in the matter of immunity of the property of the late Comte de Marveldt, who died while Austrian Ambassador to London. Following his death, the Austrian Chargé d'Affaires sought the advice of the Foreign Office as to the disposal of his effects. The Foreign Office referred the matter to the Law Officers,[1] who considered that the question had no direct connexion with diplomatic privilege, and suggested that the Austrian Chargé d'Affaires be advised to deal with the matter in conformity with the local law.[2]

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[1] Opinion of 15 February 1837 (F.O. 83/2322).

[2] Opinion of 23 March 1837 (F.O. 83/2322).

[3] Circulars to Her Majesty's Ministers Abroad, 18 January 1833 and 26 May 1837 (F.O. 83/84 and F.O. 83/85).

There is some indication that no action following the death of a minister which tends to reflect doubt upon the principle of diplomatic immunity itself will be approved. Thus in 1873 the Foreign Office received a letter from the solicitors of the executors of a Mr. Alison, late British Minister to Persia, requesting that a notice be inserted in a Teheran newspaper designed to ascertain if there were any creditors claiming payment from the executors. In his request to the Law Officers for their opinion on the subject,[3] the Foreign Secretary expressed the personal view that the appearance of such a notice in the Persian newspapers might imply in some degree that Mr. Alison had not been privileged from suit while resident in Persia as a British diplomat. The Foreign Office also asked the Law Officers whether Persian creditors might take action against the executors in England which they could not have taken against Mr. Alison in Persia. The Law Officers concurred with the view of the Foreign Office that it might be prejudicial to the principle of diplomatic immunity to publish the notice of the executors in a Teheran newspaper. With respect to the right of claimants to bring an action against the executors the reply of the Law Officers was clearly in the affirmative.[4]

The correspondence in 1872 between the Foreign Office, the Home Office, and the Law Officers of the Crown indicates that immunity is extended to the widow of a deceased diplomat, for a period sufficient to enable her to return home. On 8 November 1872 the Foreign Office transmitted to the Home Office a copy of a note from the Belgian Chargé d'Affaires in London asking if the Statute of Anne would protect the widow of an envoy from action upon a contract left unfulfilled at his death.[5] Though the inquiry was couched in general terms, the Foreign Office expressed awareness that it referred to the position of Madame Beaulieu, whose husband had rented a house while he was Belgian Minister but died before the entering. The Home Office took the view that the goods of a minister are protected for a reasonable time after his death or removal from office in order to allow their being taken back to his own country.[1] It sought advice of the Law Officers of the Crown regarding the validity of an execution upon the property of a deceased ambassador, and whether an attempted execution would be actionable under the common law or the Statute of Anne. The Law Officers, although they did not consider an attempt to seize the goods of a deceased ambassador an offence under either statute or common law, did not believe that the situation did arise.[2] Execution, they submitted, could follow only upon a judgment which was itself unobtainable against an ambassador during his life or even after his death. They hesitated to express an opinion as to the liability of the widow of an envoy, noting the absence of any English decision as well as a lack of agreement among text-writers. They admitted the existence of an established usage of extending immunity to a widow and her property, but they did not feel that it could yet claim title as strict law. In the circumstances, the Law Officers suggested the desirability of obtaining a judicial decision in the matter.

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[1] Draft, Foreign Office to the Law Officers of the Crown, 25 July 1815 (F.O. 83/2230).

[2] Opinion of 29 July 1815 (F.O. 83/2230).

[3] Draft, Foreign Office to the Law Officers of the Crown, 11 February 1873 (F.O. 83/2316).

[4] Opinion of [19] February 1873 (F.O. 83/2316). This is, of course, a settled principle: *Dickinson* v. *Del Solar*, [1930] 1 K.B. 376.

[5] F.O. 83/1660.

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[1] Letter of 10 November 1873.

[2] Opinion of 20 November 1872 (F.O. 83/1660).

THE ANGLO-AMERICAN CONSULAR CONVENTION OF 1949

By R. S. B. BEST, M.A.

THE Consular Convention between the Government of the United States of America and His Majesty's Government in the United Kingdom,[1] which was signed at Washington, D.C., on 16 February 1949, is an event of some significance in the field of international law. At the same time it marks the beginning of what may be a new phase in United Kingdom practice. Hitherto His Majesty's Government in the United Kingdom have not been a party to an international agreement of this class. The objects of this article are in general to draw attention to, and to give some account of, the salient points in the Convention, and in particular to consider certain of its aspects in relation to existing British practice in the consular field. The consideration of the latter may to a large extent be regarded as a gloss on the theme of the article in vol. 21 of this *Year Book*[2] by Sir Eric (then Mr. W. E.) Beckett on the subject of the recognition of consular immunities in English law.

The conclusion of consular conventions between states has been a fairly common occurrence during the last hundred years, and the United States have during the present century become a party to a number of such agreements with countries both in the Western hemisphere and in Europe and elsewhere.[3] The absence of a generally accepted international practice in regard to various points connected with the exercise of consular functions has led states to make agreements defining as between the parties what the position of their respective consular officers should be. The United Kingdom has been a notable exception in that it has not, as has already been mentioned, concluded a convention of this class. There is little doubt that an important reason for this state of affairs was the lack of certainty whether the Government would be justified in undertaking some of the more important obligations usually found in conventions of this class, unless they had recourse to legislation to amend existing law so as to be in a position to fulfil their treaty obligations. The researches of Sir Eric Beckett, embodied in the article referred to, showed that there were good grounds for holding that, in regard to the two most important matters of immunity of consular archives and the immunity of consular officers, the

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[1] Cmd. No. 7642.

[2] Vol. 21 (1944), pp. 34–50.

[3] For example, with Sweden in 1911, Cuba in 1926, Liberia in 1939, Mexico in 1943, the Philippines in 1947, and Costa Rica in 1948. The Treaties of Friendship and Commerce with Hungary (1926), Honduras (1928), Latvia (1928), El Salvador (1930), and Finland (1934) all also contain provisions relating to consular matters.

English courts would accept them as generally recognized rules of international law in accordance with the rule of English law that international law is part of the common law and that English law recognizes any privilege or immunity which international law requires.

The Anglo-American Consular Convention contains thirty articles and is divided into eight parts, which deal respectively with Application and Definitions, Appointments and Districts, Legal Rights and Immunities, Financial Privileges, Protection of Nationals, Notarial Acts and Other Services, Estates and Transfers of Property, and Shipping. Lastly, there are Final Provisions consisting of three articles. There is also a Protocol of Signature. It will be seen that the Convention covers the topics with which such an agreement might be expected to deal, but a study of its provisions discloses that at many points they define the functions of consular officers with greater particularity than has previously been the practice in such conventions. In particular Article 18, which is concerned with the rights of a consular officer in relation to the property of deceased persons, is based on the novel conception that the primary duty of a consular officer lies, not in relation to the property of his nationals dying within his district as such, but to the property of any deceased person dying in his district, in which one or more of his nationals may be beneficially interested. The following paragraphs contain some comments on the more noteworthy features of the Convention.

Application and definition

On the part of the United States, the Convention will apply to all its territories, continental and overseas, except the Panama Canal Zone (para. (1) of Art. 1); and, on the part of the United Kingdom Government, to Great Britain and Northern Ireland, Newfoundland,[1] Southern Rhodesia, and to the colonies, protectorates, protected states, and trusteeship territories of the United Kingdom (para. (2) of Art. 1). The fact that the territories of each party to which the Convention will apply comprise, in regard to certain matters dealt with in the Convention, a number of separate jurisdictions necessitated, if the drafting of the Convention as a whole was to be kept simple, careful definition of the word 'territory'. Paragraph 3 (*a*) of Article 1 defines territories as meaning 'that particular territory of the receiving state in which the whole or part of a consular officer's district is situated'. The article then goes on in sub-paragraphs (*b*) (United Kingdom territories) and (*c*) (United States territories) to particularize which of the territories to which the Convention will apply are to be treated as a whole and regarded as a single territory, and which are to be treated as a separate territory. Thus the United Kingdom of Great Britain and Northern Ireland, including the Channel Islands and the Isle of Man, is regarded as a single territory, except that for the purpose of exemption from taxation (Art. 13) the Channel Islands and the Isle of Man, which have their own fiscal laws, are each regarded as a separate territory. Similarly, while the whole of the continental United States forms, for the purposes of the Convention as a whole, a single territory, for the purpose of Article 13 Alaska and Hawaii are included with the continental United States as a single territory, since federal, state, and local fiscal laws will uniformly be subject to the provisions of Article 13 as regards the fiscal privileges granted to United Kingdom consular officers. Again for the purposes of Article 18 (rights in relation to estates of deceased persons), England and Wales, Scotland, Northern Ireland, the Channel Islands, and the Isle of Man and each state of the United States and the District of Columbia will each be regarded as a separate territory, because each of these entities possesses separate probate jurisdiction.

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[1] In consequence of the absorption of Newfoundland into Canada, it is understood that His Majesty's Government in the United Kingdom have addressed a note to the Government of the United States of America, informing the latter that the Convention will not apply to Newfoundland.

With regard to the other definitions, it is perhaps worth noting that the definition of nationals 'in relation to His Britannic Majesty means all citizens of the United Kingdom and colonies, all citizens of Newfoundland and South Rhodesia, and all British protected persons belonging to the territories of His Majesty to which the Convention applies. . . '. This definition takes into account the changes in nationality law effected by the British Nationality Act, 1948, and it may be expected that where the term 'national' requires to be defined in international agreements applicable to metropolitan and overseas territories entered into in future by His Majesty's Government in the United Kingdom, comparable language will be used.

Appointments and districts

The provisions of the Articles of Part II (Arts. 3 to 6) follow the generally adopted pattern and call for little special comment. It is worth noting, however, that the right to object to the inclusion in a consular district of any area in the territory of the receiving state is limited not merely to an area which is not within the consular district of a third state. There is the further requirement, before the right of the receiving state to object may be exercised, that the area is also not open to the trade commissioners or commercial representatives of a third state. The words 'commercial representatives' in the context in which they appear are, it is considered, meant to include only official trade representatives, and are not to be regarded as including commercial travellers representing private firms.

Paragraph (3) of Article 6 contains a provision which reflects the modern development of a unified foreign service, adopted by the United States and, recently, by the United Kingdom, in consequence of which a member of a diplomatic mission may discharge both diplomatic and consular functions. When this occurs, it is provided that an officer shall be entitled in his consular capacity and with regard to the performance of consular functions to the benefits, and be subject to the obligations, of the Convention. If, however, he is recognized as a diplomatic officer by the receiving state, he may also enjoy any additional personal privileges to which he may be entitled. The paragraph is so worded that the distinction between consular and diplomatic officials is retained, so that a consular official who happens to be assigned to diplomatic functions by the sending state must be recognized as a diplomatic officer by the receiving state in order to enjoy full diplomatic immunity.

Legal rights and immunities

This part of the Convention contains some of its most important and interesting provisions. In effect it represents the measure of agreement between two countries, which may be regarded as leaders among English-speaking communities, in the development and application of international law, on the legal status which can properly be accorded to consulates and to consular officers.

In discussing Part III of the Convention (Arts. 7 to 11), Articles 10 and 11 will first be considered, as it is these articles which deal with the two fundamental consular immunities, namely, the inviolability of a consul's archives, and immunity from process in respect of acts performed by a consul in the course of his official duties. As regards the former, as Sir Eric Beckett has pointed out, adopting the language used by the Harvard Law School Department of Research in International Law in 1932, it is 'the most universally recognised of all consular immunities'. While there appears to be no English case in which the court decided that such inviolability should be recognized, there can be no doubt that consular archives and official papers are inviolable under international law, and that the rule of international law is so clear that the English courts would recognize it.

The immunity for official consular acts can properly be regarded as flowing from the position of a foreign consul, whom the receiving state accepts as an officer of a foreign state charged with the performance of consular duties, and therefore entitled to enjoy independence from the local jurisdiction in respect of such duties. Again there is much specific authority, as Sir Eric Beckett has shown, to support the recognition of this immunity, and it is reasonably certain that the English courts would so hold, where the proceedings arose in respect of an act performed in the course of the consul's official duties, falling within the functions of a consul under international law.

If the provisions of other conventions to which the United States are a party (as for instance those with Mexico and Costa Rica) regarding inviolability of archives and consular immunity are compared with those contained in the Anglo-American Consular Convention, it will be seen that the recognition given to the inviolability of archives is similar. The language of other conventions to which the United States are a party goes, however, much farther than does the present Convention in treating of consular immunity. Thus paragraph (1) of Article II of the Consular Convention with Mexico[1] provides as follows:

> 'Consular officers, nationals of the State by which they are appointed, and not engaged in any private occupation for gain within the territory of the State in which they exercise their functions, shall be exempt from arrest in such territory except when charged with the commission of an act designated by local legislation as crime other than misdemeanor and subjecting the individual guilty thereof to punishment by imprisonment. Such officers shall be exempt from military billetings, and from service of any military or naval, administrative or police character whatsoever.'

It will be seen that as regards consular immunity this article makes no distinction as between official and non-official acts and goes far in assimilating the immunity of a consular officer to that of the complete immunity from process of a diplomatic official. Other consular conventions to which the United States are a party contain similar provisions. Indeed, it can be said that it has been the practice of the Department of State to regard consular officers as being entitled to complete immunity from proceedings in the courts of the receiving state, except in cases where the officer is charged with serious crime.

The Anglo-American Consular Convention, however, restricts consular immunity to official acts. Article II (1) (*a*), which deals with this point, reads as follows:

> 'A consular officer or employee shall not be liable, in proceedings in the courts of the receiving state, in respect of acts performed in his official capacity, falling within the functions of a consular officer under this Convention, unless the sending state requests or assents to the proceedings through its diplomatic representative.'

The United States have, it is clear, been prepared to accept a more restricted degree of immunity than that which they have felt to be desirable when concluding other consular conventions to which they have been a party in recent years; and it is no doubt true to say that the view of the status of consular officers represented by the text of the Anglo-American Consular Convention reflects more closely that held by the United Kingdom Government than that which can be regarded as the American norm. There are two points which may be noted in this connexion. First, the American policy, as exemplified in other conventions, would seem to go beyond what can be regarded as the generally accepted rule of international law. If the true basis, on which governmental or international officials enjoy varying degrees of immunity from proceedings in the courts of the countries where they exercise their functions, is that they should enjoy immunity only to the extent that it is reasonably necessary to enable them to perform the duties which have been assigned to them, it is arguable whether consular officers should be granted the complete personal immunity which among civilized states is usually accorded to diplomatic officials. The explanation of the immunity of the latter is that they are clothed with the personal immunity of the head of the mission, who in turn is accorded this complete immunity as the personal representative of his sovereign. Diplomatic immunity can therefore be justified as deriving from the international right of the sovereign, whose representative the head of the mission is. Consuls, however, unless they are also recognized as diplomatic officers, do not stand in the same relationship to the head of a mission as that occupied by its diplomatic members.

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[1] Signed at Mexico City, 12 August 1942, and ratified 1 June 1943 (*United States Treaty Series*, No. 985).

The American view of consular immunity, as exemplified in consular conventions to which the United States are a party, is no doubt the result of a process of inductive reasoning. The position and responsibilities of consuls at important posts are often in fact more important, and much greater than those of diplomatic second, or even first, secretaries. Moreover, with the amalgamation of the two services, a foreign service official may go from holding the position of a counsellor of Embassy to that of, say, Consul-General at New York. It is unreasonable and inappropriate, so the argument would run, that such an official should cease to enjoy personal immunity at his consular assignment, and be liable, for instance, to police court proceedings in respect of petty motoring offences. It is submitted that the position taken on this matter by the United Kingdom is historically well established. If it is contended that, whether or not the theoretical explanation of the personal immunity of diplomatic officers is correct, the practical conclusion should be that consuls should enjoy the same personal immunity as diplomatic officers of comparable rank, the answer to this argument may well be that since, with the great increase in modern times in the diplomatic staff of embassies, the relationship between the head of mission and the members of his diplomatic staff has so much changed from the days of small ambassadorial suites, the justification of diplomatic immunity, namely, that the diplomatic staff are clothed with the immunity of the head of their mission, can no longer be accepted. The personal immunity of all officials, whether diplomatic, consular, governmental, or international, would then be based on the criterion whether it was reasonably required for the proper discharge of their official duties. If this criterion was adopted, it could be argued that the true conclusion should not be, as would appear to be that adopted by the United States, that consular officers should enjoy the personal immunity now generally accorded to diplomatic officials, but that the position of the latter should be assimilated to that recognized under general international law as belonging to consular officers. In short, personal immunity should only be accorded to diplomatic officials, when it can be shown that it is necessary for the proper discharge of the duties to which they are assigned.

The second point relating to the general question of consular immunity concerns the language of sub-paragraph (*b*) of paragraph (1) of Article II, which runs as follows:

> 'A consular officer who is a national of the sending state and is not a national of the receiving state and is not engaged in any private occupation for gain in the receiving state shall enjoy the most favourable treatment possible under the laws of the territory with regard to arrest or prosecution in respect of acts performed otherwise than in his official capacity.'

This provision is interesting in connexion with the discussion, in the preceding paragraphs of this article, of the proper extent of consular immunity and of its relation to diplomatic immunity. If the language of the sub-paragraph is closely examined, it will be seen that, as regards the United Kingdom (and it is conceived that the position in the United States would be similar), it does no more than state the existing practice. There is only one code of law which has to be applied equally to all persons. To say therefore that a consular officer shall 'enjoy the most favourable treatment possible under the laws of the territory' is in effect to say that the consular officer shall be subject to the ordinary processes of the courts in respect of his unofficial acts. The sub-paragraph may, however, be regarded as giving emphasis to the position occupied by a foreign consul as a representative, in his own field of activity, of his government. Clearly as between the United States and the United Kingdom, this provision is unlikely to be invoked. While, however, it does not contain any assertion of immunity from arrest or prosecution in respect of the unofficial acts of consular officers, it may be regarded as an official statement of the view of the two governments that the status of a consular officer requires that he should not be subjected to interference by the authorities of the receiving state based on a mere pretext. In view of the difficulties which can be placed by the authorities of totalitarian governments, ostensibly on legal grounds, in the way of the proper discharge on the part of foreign consuls of their duties, it may be considered as a declaration 'for the record'.

It has been suggested earlier in this article that, under the rule of consular immunity which there is reason to believe that the English courts would recognize, would be comprised any act performed in the course of the consul's official duties, falling within the functions of a consular officer under international law. It will be noted, however, that in Article 11 (1) (*a*), already quoted, the language actually used is 'falling within the functions of a consular officer under this Convention'. It is thought, however, that this language achieves the same result as would have been attained by substituting for the words 'under this Convention' the words 'under international law'. The functions of a consular officer with which the Convention is concerned are those which under general international law are recognized as consular functions. Consideration of Article 28 supports this interpretation. The first two sentences of paragraph (1) are as follows:

> 'The provisions of Articles 15 to 27 relating to the functions which a consular officer may perform are not exhaustive. A consular officer shall be permitted to perform other functions, involving no conflict with the law of the territory, *which are either in accordance with international law or practice relating to consular officers recognised in that territory* or are acts to which no objection is taken by the receiving state.'

In effect the italicized words, taken in conjunction with Article 11 (1) (*a*), provide that the functions of a consular officer which are to be regarded as official are those which fall under international law either because they are dealt with in the Convention and the Convention itself is concerned with consular functions which are in accordance with international law and practice, or because they are functions which are otherwise in accordance with international law or practice, as recognized in the territory of the receiving state.

Article 11 also includes provisions with regard to the giving of testimony in civil and criminal cases, to the exemption of a consular officer and his family from certain requirements which normally apply to aliens, and to providing for the insurance against third-party risks of motor vehicles, marine vessels, and aircraft employed for consular purposes, or owned by a consular officer or employee. It further clarifies the scope of consular immunity as defined in paragraph (1) (*a*) of the article by stating that it does not 'preclude a consular officer or employee from being held liable in a civil action arising out of a contract concluded by him in which he did not expressly contract as agent for his government and in which the other party looked to him personally for performance'.

In the other articles comprised in Part III of the Convention, the most interesting provision from the point of view of international law is that contained in paragraph (4) of Article 8, which is as follows:

> 'A consular office shall not be entered by the police or other authorities of the territory, provided such office is devoted exclusively to consular business, except with the consent of the consular officer or, if such consent cannot be obtained, pursuant to appropriate writ or process and with the consent of the Secretary of State for Foreign Affairs in the case of the territories referred to in paragraph (2) of Article 1 and of the

Secretary of State in the case of the territories referred to in paragraph (1) of Article 1. The consent of the consular officer shall be presumed in the event of fire or other disaster or in the event that the authorities of the territory have probable cause to believe that a crime of violence has been or is being or is about to be committed in the consular office. The provisions of this paragraph shall not apply to a consular office which is in the charge of a consular officer who is a national of the receiving state, or who is not a national of the sending state.'

The extension of immunity to consular premises as well as to consular archives is a feature of the consular conventions concluded by the United States in recent years. It will, however, be seen from the above quotation that the Anglo-American Convention defines in detail the scope of this immunity, and that it is subject to a number of limitations. It can only be claimed when the consular office is devoted exclusively to consular business and entry may take place with the consent of the consular officer concerned (and it is apprehended that, if there were circumstances in which this provision was called into play, such consent would usually be forthcoming). If, however, there are legal grounds for entry, and the consular officer's consent is withheld or cannot be obtained, entry may take place with the consent respectively of the Secretary of State of the United States, or of the Secretary of State for Foreign Affairs. Furthermore, in the event of a fire or other emergency, or in a case involving crime, the consular officer's consent may be presumed. Lastly, there is the further limitation that the provisions of the paragraph apply only when the consular office is in charge of a career consular officer of the sending state. In view of the limited scope of the immunity, which, as regards the United Kingdom, does no more than state in terms the procedure which, if the issue of entry were to arise, the police might be expected to adopt, the paragraph in effect does no more than state what His Majesty's Government in the United Kingdom would regard as the course of action required by international practice. On the other hand, it is questionable whether the authority in international law or practice, in regard to the immunity conferred under this paragraph, is so well established that, if the point came before the courts, as, for instance, in connexion with the execution of a search warrant, they could be relied on to give recognition to it as part of English common law. It is on this account that the Government considered it necessary to include in the Consular Conventions Act, 1949,[1] which was introduced into the House of Commons in February 1949, a clause to ensure that effect can be given to this paragraph of Article 8, despite the fact that this, or a greater, degree of immunity is in fact recognized in many countries.

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[1] An Act to confer upon the consular officers of foreign states with which consular conventions are concluded by His Majesty certain powers relating to the administration of the estates and property of deceased persons; to restrict the powers of constables and other persons to enter the consular offices of such states; and to amend sections 176 and 521 of the Merchant Shipping Act, 1894 (26 April, 1949).

No doubt in practice the Foreign Secretary (or the Secretary of State) would concur in the entry of the police to execute a warrant, if this was necessary in the interests of law and justice. The most urgent cases are covered by the exceptions (where consent is presumed), and in other cases it is probable that matters would be arranged with the agreement of the consular officer concerned, given the possibility of a short delay and of discussion, which the procedure provides for, with the State Department or the Foreign Office. As regards His Majesty's overseas territories, to which the Convention will apply, clearly the governor or other principal authority in such territories is primarily responsible for the maintenance of law and order. He would none the less be expected to refer to the United Kingdom Government in connexion with such matters, since His Majesty's Government in the United Kingdom is ultimately responsible for the international relations of such territories. If a case arose in an overseas territory, where under the Convention the consent of the Foreign Secretary had to be obtained to enter into American consular premises, the circumstances would be likely to be so exceptional that in any event reference back to the Colonial Secretary would be likely. In such a case the latter would no doubt in practice, even if the Convention did not exist, wish, before taking a decision, to consult the Foreign Secretary.

The other articles of Part III of the Convention are concerned with acquisition of land for consular premises and for residences of consular officers and employees (Art. 7), and with the exemption of consular property, including the private residence and certain of the personal property of a consular officer or employee, from military requisition or billeting as the case may be. Property may, however, be taken for purposes of national defence or public utility, provided that due compensation is made promptly.

Two points in connexion with Article 7 are worth noting. First, there is a reference at the end of paragraph (1) to obtaining the permission of the authorities of the territory to the acquisition of land. In relation to the United Kingdom, this permission will, at any rate where land is acquired in fee simple, include the obtaining of a licence in mortmain. A foreign state or government is to be regarded for this purpose as a corporation and therefore prohibited from acquiring land in fee simple (and also perhaps on long leases on a ground rent), unless the permission of the Crown to its so doing is given. Most corporations are relieved of the necessity of obtaining licences in mortmain by provisions in the Companies Acts or other statutes, and indeed foreign companies are now relieved of this requirement by the Companies Act, 1948;[1] but foreign states and governments have not been so relieved.

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[1] See s. 408.

Secondly, it has not been found possible immediately to give effect in relation to certain overseas territories to the provisions enabling land to be acquired 'whether on lease, or in full ownership, or under such other form of tenure as may exist under the laws of the territory'. In consequence of the fact that the laws of certain overseas territories did not at the time of signature of the Convention allow a foreign government to own land, these territories[1] were excepted under the provisions of the Protocol of Signature from the application of paragraph (1) of Article 7 'until notice is given by the Government of the United Kingdom of Great Britain and Northern Ireland to the Government of the United States of America that the law of these territories or any of them has been amended to permit of effect being given to these provisions' (i.e. to Art. 7 (1)).

The remaining parts of the Convention (Part IV, Financial Privileges; Part V, Protection of Nationals; Part VI, Notarial Acts and Other Services; Part VII, Estates and Transfers of Property; and Part VIII, Shipping) do not, broadly speaking, raise issues of general principle in international law of the kind discussed in preceding paragraphs of this article. Their main interest consists in the very complete manner in which they set out the rights and duties of consular officers and employees in relation to their functions and privileges. It is probably true to say that no previous consular convention has dealt with such thoroughness with the subjects treated in these parts of the Anglo-American Convention. They can be regarded, as indeed can the Convention as a whole, as in general declarative of the views of the Governments of the United States and of the United Kingdom on the international law and practice relating to consular officials. A full discussion of them is not practicable within the scope of a general article. There are, however, several points which may be mentioned.

Financial privileges

It has already been stated, in the discussion of the rule of consular immunity, that it appears, from a study of other consular conventions to which the United States are a party, that the United States Government has been prepared to go a considerable way towards assimilating the status of consular to that of diplomatic officials. A comparable tendency may be observed in regard to exemption from taxation. Thus the United States–Mexican Consular Convention, previously referred to, gives consular officers and employees of the sending state, who are its nationals and who are not engaged in any private occupation for gain within the territory of the receiving state, complete exemption from taxation, except in regard to taxes on immovable property and to income derived from property in the territory of the receiving state, or belonging thereto (Art. III). Such a wide exemption goes beyond what can be regarded as generally accepted practice. Article 13 of the Anglo-American Consular Convention, in addition to including an exception from tax exemption similar to that provided for in the United States–Mexican Convention, also excepts from exemption duties payable on the withdrawal of goods from a bonded warehouse (e.g. excise tax on spirits, wines, and tobacco, which, however, can be *imported* free of tax under Art. 14), death duties, and certain stamp duties. There will also be no exemption from United Kingdom purchase tax since legally this tax does not fall on the purchaser, but on the vendor or some other person in the chain of distribution between the manufacturer and the retail vendor. As the general practice of the United Kingdom Government has been to confine exemption from taxation of foreign consular officials to their official emoluments and to a limited right of free importation on their first and subsequent arrivals in the United Kingdom, the Convention in granting comprehensive exemption from taxation, apart from stated exceptions, reflects the influence of American opinion on this matter.

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[1] Bahamas, Barbados, Bermuda, Cyprus, Federation of Malaya, Gambia, Gibraltar, Gold Coast, Hong Kong, Leeward Islands, North Borneo, Sarawak, Somaliland, Tanganyika, and Uganda.

Estates and transfers of property

Part VII of the Convention, which is concerned with Estates and Transfers of Property, contains some of its most interesting legal provisions. The traditional view of the responsibility of consular officers in relation to the property of deceased persons has in general been that their primary concern is with the property of their own deceased nationals. If, however, this aspect of a consul's functions is analysed, it will be seen that, if he is to fulfil his duty of protecting the interest of his nationals, he may well have cause to be concerned with the property of persons, whether nationals or not of the receiving state, who die leaving property in his district, in which property a national of the consul's state is, or may be, beneficially interested. It follows therefore that the criterion which should govern consular action in estate matters should properly be not the nationality of the deceased property owner, but the nationality of the persons beneficially interested in the deceased person's estate. No doubt a consular officer's nationals have on many occasions applied to him for assistance in protecting their interests in the estate of a person who has died leaving property in the country in which the officer is exercising his functions. The fact that many American citizens, for instance, come of British stock, and have family connexions with citizens of the United Kingdom, has led to a slightly variable but customary practice among British consuls in the

United States of protecting the interests of such citizens in the estates of deceased American citizens. It is therefore particularly appropriate that the first consular convention to make provision for this practice as a defined treaty right should be the Anglo-American Consular Convention.

The method of achieving this object (primarily under Art. 18) is by providing that a consular officer of the sending state shall be entitled to obtain a grant of representation of a deceased person when a national of the consular officer would have been entitled to receive it, if that national had been present and represented before the court. The consular officer is regarded as having *ex officio* a right to represent his absent national who does not take steps to be represented otherwise. The consular officer is, however, only entitled to act, if his national is not resident in the territory and has taken no action on his own behalf. Should the interested national become legally represented in the territory of the receiving state, the consular officer's position will be as if he previously had a power of attorney from the national which has ceased to be operative, as from the date when the consular officer is informed that his national is otherwise legally represented. These provisions will apply in any case where a deceased person leaves property in the territory of the receiving state in which a legal or equitable interest is held or claimed by a national of the sending state who is not resident in the territory and is not legally represented there.

Article 18 of the Convention sets out in detail the rights of a consular officer of the sending state in regard to the steps he may take to protect and preserve the interests of the person whom he is entitled to represent, including if necessary the right of full administration of the estate of the deceased person. It is also provided that although a consular officer may be regarded, when administering an estate (or receiving property, for which provision is made in Art. 19) on behalf of his nationals, as exercising a consular function, he will not enjoy, in respect of his acts in this sphere, the immunity from proceedings in the courts of the receiving state which under international law he could claim generally in respect of acts performed in his official capacity. Similarly, it is provided that he will not be able to claim in respect of any document in his possession relating to the administration of an estate, which he has undertaken, that because it is an official document, or part of his archives, he can, under general international law, refuse to produce it.

It was considered that in order to give effect to the estate provisions in the Convention, certain minor amendments to the existing law of Great Britain and Northern Ireland governing the administration of estates was required. The Consular Conventions Act[1] therefore includes provisions designed to make the necessary amendments to the existing law.

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[1] See p. 288, n. 1.

Shipping

The longest section of the Convention is Part VIII, that entitled Shipping. The supervision of the navigation of a sending state, where such a state is a great maritime power, will form an important part of the duties of those of its consular officers, whose districts include a principal port or ports of the receiving state. It is therefore fitting that, in a convention between two great seafaring nations, the rights and duties in relation to shipping of their respective consular officers should be carefully defined (Arts. 21 to 27). These articles include provisions regulating the exercise of the normal functions of a consular officer of safeguarding merchantmen sailing under the flag of his state which enter a port in the receiving state; of examining ship's papers; of giving assistance to the master and crew in their business with the local authorities and in legal proceedings before the local courts in which they may be involved; of settling disputes between the master and crew; and of the safeguarding of wrecked ships and their cargo. It is interesting to note that Article 24 gives a consular officer the right to inspect, at ports within his consular district, a vessel of any flag provided that it is destined to a port of the sending state. The object of this provision is

> 'to enable him to procure the necessary information to prepare and execute such documents as may be required by the law of the sending state as a condition of entry of such vessel into its ports, and to furnish to the competent authorities of the sending state such information with regard to sanitary or other matters as such authorities may require'.

Article 27 is mainly concerned with providing for the transmission through the consular channel of wages and effects of a deceased master or seaman, nationals of the sending state and belonging to a vessel of the receiving state, to any person entitled to succeed to the property, otherwise than as a creditor, who is resident in the sending state.

The principal interest of Part VIII lies, however, in the provisions of Article 23, which define the spheres of the jurisdictions repectively of the territorial state and of the flag state. In this connexion it should be remembered that it can be regarded as a rule of general international law that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes unless by treaty or otherwise the two countries concerned have come to some different understanding or agreement. It must, however, be also remembered that it is, if not a rule, a well-established practice of international law that the local government should abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew in relation to the vessel, or among themselves. The position is, therefore, generally accepted among civilized nations that all matters of discipline and all things done on board which affect only the vessel or those belonging to her, not involving the preservation of peace and order, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the country to which the vessel belongs, and in particular, by its consular officers, as the laws of that country or the interests of its commerce may require.

A consequence of the international practice referred to necessarily is that a vessel in a foreign port is subject to two jurisdictions, that of the Government of the country in whose port it is and that of the flag. It might be expected that the tendency of United Kingdom theory, in view of our long maritime pre-eminence and of the great importance of our sea-going trade, would have been to exalt the jurisdiction of the flag at the expense of that of the local government. In matter of fact, United Kingdom theory (though perhaps not practice)[1] has been less liberal towards the jurisdiction of the flag than that of other countries, such as France, having less substantial maritime interests.

Article 23 may therefore be considered as an advance on the part of His Majesty's Government in the United Kingdom in their recognition of the jurisdiction which may under general international law be properly accorded to the flag.[2]

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[1] See Pitt Cobbett, *Cases on International Law*, vol. i (5th ed. by F. Temple Gray), pp. 288 ff.

[2] In order that the treatment in the Convention of this issue may be appreciated, the article is quoted in full. It is as follows:

'(1) Except at the request or with the consent of the consular officer, the administrative authorities of the territory shall not concern themselves with any matter concerning the internal management of the vessel. The judicial authorities of the territory may, however, exercise any jurisdiction which they may possess under the law of the territory with regard to disputes as to wages and contracts of service between the master and members of the crew. The administrative and judicial authorities will not interfere with the detention in custody on the vessel of a seaman for disciplinary offences, provided such detention is lawful under the law of the sending state and is not accompanied by unjustifiable severity or inhumanity.

'(2) Without prejudice to the right of the administrative and judicial authorities of the territory to take cognizance of crimes or offences committed on board the vessel when she is in the ports or in the territorial waters of the territory, and which are cognizable under the local law or to enforce local laws applicable to vessels in ports and territorial waters or persons and property thereon, it is the common intention of the High Contracting Parties that the administrative and police authorities of the territory should not, except at the request or with the consent of the consular officer—

(*a*) concern themselves with any matter taking place on board the vessel unless for the preservation of peace and order or in the interests of public health or safety, or

(*b*) institute prosecutions in respect of crimes or offences committed on board the vessel unless they are of a serious character or involve the tranquillity of the port or unless they are committed by or against persons other than the crew.

'(3) If, for the purpose of the exercise of the rights referred to in paragraph (2) of this Article, it is the intention of the authorities of the territory to arrest or question any person or to seize any property or to institute any formal inquiry on board the vessel, the master or other officer acting on his behalf shall be given an opportunity to inform the consular officer, and, unless this is impossible on account of the urgency of the matter, to inform him in such time as to enable the consular officer or a consular employee on his staff to be present if he so desires. If the consular officer has not been present, or represented, he shall be entitled, on his request, to receive

It is of special interest to note that, under the provisions of paragraph (1) of the article, the detention of a seaman on a vessel of the sending state for disciplinary offences will be regarded as lawful, 'provided such detention is lawful under the law of the sending state and is not accompanied by unjustifiable severity or inhumanity'. One effect of this provision is clearly intended to be that, in the circumstances contemplated, the writ of habeas corpus would not run. It would be startling if a consular convention resulted in placing a restriction on the rights to have recourse to this fundamental procedure in English law. In all probability, however, this provision in the Convention goes no farther than what may be regarded, despite the absence of judicial decision on the point, as part of the common law. There appears to be no case where the courts have been asked to issue a writ of habeas corpus in respect of a seaman in custody on a foreign ship in a British port. Since it is open to anyone, and not merely an interested party, to apply for habeas corpus, the presumption *ex silentio* is that in practice it has been recognized in the United Kingdom that the detention of a seaman on a foreign ship in British ports falls within the scope of the jurisdiction of the flag, that is to say, it is recognized under English law

(1) that the law of the flag governs matters of internal discipline; and

(2) that a detention of a seaman by his master on a foreign ship in a British port for discipline, which is lawful by the law of the flag and is not (by reason of its inhumanity) contrary to public policy, must be recognized by English law as a lawful detention.

It is no doubt because this presumption was thought to be well founded, and would be likely to be recognized by the courts if a case arose, that it was not considered necessary to include in the Consular Conventions Act any provision dealing with the matter.

The foregoing survey of the first Consular Convention which His Majesty's Government in the United Kingdom have signed gives some indication of the comprehensive nature of the agreement. It has succeeded in covering the whole field of consular work with a thoroughness which has not previously been attempted in this class of international agreement. The Convention may be regarded as a valuable achievement in a department of international law particularly concerned with the interests of the ordinary citizen. This is a notable achievement in times in which the pressure of general political preoccupations can easily lead to the neglect in the international field of private interests.

from the authorities of the territory full information with regard to what has taken place. The provisions of this paragraph do not apply to routine examinations by the authorities of the territory with regard to customs, health and the admission of aliens, or to detention of the vessel or of any portion of her cargo arising out of civil or commercial proceedings in the courts of the territory.'

THE KILLING OF HOSTAGES AS A WAR CRIME

By LORD WRIGHT

THE object of the present article is to discuss the question whether it is legitimate under international law to kill hostages. The importance of that question is obvious from the extent to which, during the Second World War, Germany resorted to that practice in the occupied countries. It is stated in the sixth edition of Oppenheim's *International Law* (vol. ii, section 259, p. 461) that:

> 'During the [First] World War, Germany adopted a terrible practice of taking hostages in the territories occupied by her armies, and shooting them when she believed that civilians had fired upon German troops.'

That practice was repeated and followed to an enormously greater extent in the Second World War. It was indeed a cruel and terrible course of conduct. It would have been so if it had been followed merely in a few instances, but the actual extent which is now on record of the frightfulness perpetrated by Germany in the killing of hostages exceeds all possible prevision. It may be that if these atrocities had been punished in the First World War the German generals and administrators might have felt some restraint from the fear of personal punishment. But the Leipzig fiasco held the ground and seemed to promise immunity. For that, among other reasons, it is essential that it should be made clear, as far as can be done at this stage, what is the law on the matter.

The feature of the Second World War was the military occupation by the Axis Powers of the greater part of the continent of Europe. As time went on the spirit of the populations of the occupied nations asserted itself in what has been called the resistance or underground movement. The occupying armies found it difficult to put an end to the activities of these patriots, who were at great risk struggling to be free and who, to a large extent, were supported and helped by the Allies outside their countries. There is no doubt that the resistance movement created a serious problem for Germany. It may be here assumed that they were entitled to treat any members of the resistance movement who fell into their hands as being guilty of unlawful belligerency. This is a matter which will call for careful consideration some day, but which I do not intend to discuss here. However that may be, the German policy of killing hostages was carried on for the purpose of crushing the resistance movement. It was very difficult, no doubt, to identify and capture the actual members of the movement, and the Germans, with a view to suppressing these efforts, adopted the terrible practice of slaughtering great numbers of the innocent inhabitants of the occupied countries. They were slaughtered simply for the purpose of terrorizing the population; they were persons who had no connexion whatever with the active movement. It may be that as patriots they had sympathy with the resisters, but that sympathy, if it did not show itself in overt acts, could not be said to deprive them of their character of innocence in this matter. Hundreds of thousands of so-called 'hostages' were slaughtered in this way.

The fullest and most authentic account of this practice in the Second World War is the elaborate, careful, and convincing statement of the facts which is to be found in one of the series of cases called the 'Subsequent Proceedings at Nuremberg'. There were twelve of these cases and, at the time of writing, judgment has been given in eleven. The most instructive case in this connexion of so-called 'hostages' or 'reprisal prisoners' is generally referred to as the *List*, or *Southeast*, or *Hostages* case. A careful report of that case will be found in vol. VIII of the United Nations War Crimes Commission's *Law Reports of Trials of War Criminals* (subsequently referred to as *Law Reports*). A wide range of crimes were charged, but the count that refers to this particular matter will be found summarized on p. 35 of the *Law Reports* in a quotation from the Indictment which runs as follows:

> '1. That defendants were principals or accessories to the murder of hundreds of thousands of persons from the civilian population of Greece, Yugoslavia and Albania by troops of the German Armed Forces; that attacks by lawfully constituted enemy military forces and attacks by unknown persons, against German troops and installations, were followed by executions of large numbers of the civilian population by hanging or shooting without benefit of investigation or trial; that thousands of noncombatants, arbitrarily designated as "partisans", "Communists", "Communist suspects", "bandit suspects" were terrorised, tortured and murdered in retaliation for such attacks by lawfully constituted enemy military forces and attacks by unknown persons; and that defendants issued, distributed and executed orders for the execution of 100 "hostages" in retaliation for each German soldier killed and fifty "hostages" in retaliation for each German soldier wounded.'

That count was fully established in the course of the trial. The Tribunal had to consider a mass of evidence, the transcript of which consisted of 9,556 pages. The Tribunal refers to certain orders of Hitler, Keitel, and others, and adds that the shooting of innocent members of the population increased after these orders were issued, and a large number of reprisals against the population were carried out on the basis of one hundred to one. That means that one hundred of the innocent inhabitants were massacred for the life of one German soldier. The Tribunal, as one illustration, referred to the execution by shooting of about 2,000 'Communist suspects' in reprisal for twenty-two members of the 2nd Battalion of the 421st German Regiment. It is said, and the statement is correct, that hundreds of thousands of the innocent population were thus destroyed. It is clear that if the innocent inhabitants of the occupied country were seized and shot in that way as being hostages, the position of a hostage has altered a great deal from the conceptions attached to the word as used in the eighteenth century.[1]

What is intended to be meant by the words 'hostages' and 'reprisal prisoners', as used in connexion with the frightful practice which is being considered, is this: 'hostage' means an innocent member of the population of the occupied country who is seized and held in custody and dealt with and generally shot in order to terrorize and repress the resistance movement. It is not, however, postulated that there should be any connexion between the inhabitants so dealt with and the acts of resistance which resulted in the death of German soldiers. These so-called 'hostages' who are slaughtered in this way are simply innocent non-combatants. The other expression, 'reprisal prisoner', does not differ essentially in its meaning from 'hostage'. In each case innocent members of the non-combatant population were arbitrarily taken and killed by the Germans. If there is any difference it lies in this, that the hostage is kept ready to be shot if acts of resistance occur, whereas the reprisal prisoner is seized and shot after the occurrence of such acts without being held in detention.

The two expressions seem to be used in the literature connected with this matter almost interchangeably, with the sole exception that the 'hostage' is treated as fulfilling what has been called a prophylactic function. It is an anticipatory precaution, whereas the 'reprisal prisoner' suffers his fate because of acts which have already been perpetrated. For the purpose relevant here there is no essential difference between so-called 'hostages' and so-called 'reprisal prisoners'. In either case the essence of the matter is that innocent non-combatants are shot in order to terrorize the inhabitants. The mere intervention of a delay between the seizure and the shooting does not seem to make any difference, for in neither case has the shooting any relation to guilt or to illegitimate acts perpetrated by the particular individuals who suffer the penalty. This appears from a study of the facts. The actual position is authoritatively summarized in brief but pregnant words in the Judgment of the International Military Tribunal at Nuremberg (referred to hereafter as the I.M.T.). Under the heading 'Murder and ill-treatment of civilian population' it is stated:

> 'Article 6 (*b*) of the Charter provides that "ill-treatment . . . of civilian population of or in occupied territory . . . killing of hostages . . . wanton destruction of cities, towns or villages" shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated:
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> "Family honour and rights, the lives of persons and private property, as well as religious convictions and practices must be respected." '

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[1] See Oppenheim, *International Law*, vol. i (7th ed., 1948), section 525.

The Judgment goes on to state that the 'practice of keeping hostages to prevent and to punish any form of civil disorder was resorted to by the Germans . . . '. In these few words the I.M.T. covered what is meant by both so-called 'hostages' and so-called 'reprisal prisoners'. In the case of the former the words used are 'to prevent', in the case of the latter the words are 'to punish'. In the meantime, it is sufficient to point out that in all these discussions the word 'hostages' is used in a wide or pregnant sense which goes beyond the meaning which was earlier attached to it. It must be construed with reference to the course of procedure, the systematic terrorism, which was in vogue. The distinction between the killing of innocent non-combatants in respect of acts already done by others and the killing of innocent non-combatants in order to prevent the doing of similar acts is not relevant for this purpose, because the whole gist of the argument is that innocent non-combatants cannot be thus killed. The principle which forbids such killing is long established, or at least was very clearly stated by Grotius in the seventeenth century and by Vattel in the eighteenth century. The prohibition against such deeds is clearly expressed in the most categorical terms by these great exponents of the law of nations. This is so important that I must repeat in detail the language which they respectively used.

A quotation which I make from Grotius is from his famous work *De Jure Belli ac Pacis Libri Tres*.[1] Grotius's text is quite categorical:

> 'Chapter XVIII.—'Hostages should not be put to death unless they have themselves done wrong.'

Two paragraphs from the explanation which follows this statement may be quoted:

> '1. What decision according to the law of nature should be rendered in regard to hostages may be gathered from what we have said already. In former times it was commonly believed that each person had over his own life the same right which he had over other things that come under ownership, and that this right, by tacit or expressed consent, passed from individuals to the state. It is, then, not to be wondered at if we read that hostages who were personally guiltless were put to death for a wrong done by their state, either as though done by their individual consent, or by the public consent in which their own was included. But now that a truer knowledge has taught us that lordship over life is reserved for God, it follows that no one by his individual consent can give to another a right over life, either his own life, or that of a fellow-citizen.'
>
> 'Consistently with this point of view Agathias relates that to the good general Narses it seemed atrocious to exact punishment from innocent hostages. Other writers say the same of other generals. They cite also the example of Scipio, who said that he would not be severe with innocent hostages, but with the individuals themselves who

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[1] *De Jure Belli ac Pacis Libri Tres*, III, xi, 18. The translation used is that in the *Classics of International Law* (1925).

had been guilty of defection,[1] and that he would exact punishment not from an unarmed foe, but from a foe in arms.'

> '[1] Julian says the same in Eunapius, Selections on Embassies, ix (= Fragmenta Historicorum Graecorum, IV, Section 12, p. 18).'

The following are quotations from Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, liv. ii, chap. xvi:

> '245. Des Otages. Enfin, une précaution de sûreté, très-ancienne & très usitée parmi les Nations, est d'exiger des Otages. Ce sont des personnes considérables, que le Promettant livre à celui envers qui il s'engage, pour les retenir jusqu'à l'accomplissement de ce qui lui est promis. C'est encore ici un Contrat d'engagement, dans lequel on livre des Personnes libres, au lieu de livrer des villes, des pays, ou des joyaux précieux. . . .
>
> '246. Quel droit on a sur les Otages. Le Souverain qui reçoit des Otages n'a d'autre droit sur eux que celui de s'assurer de leur personne, pour les retenir jusqu'à l'entier l'accomplissement des promesses dont ils sont le gage. Il peut donc prendre des précautions, pour éviter qu'ils ne lui échappent; mais il faut que ces précautions soient modérés par l'humanité, envers des gens, à qui on n'est point en droit de faire souffrir aucun mauvais traitement, & elles ne doivent point s'étendre au-dela de ce qu'exige la prudence.
>
> . . . .
>
> '261. Du droit fondé sur la Coûtume. Nous avons déjà observé, qu'on ne peut légitimement ôter la vie à un Otage, pour la perfidie de celui qui l'a livré. La Coûtume des Nations, l'usage le plus constant ne sçauroit justifier une cruauté barbare, contraire à la Loi Naturelle. Dans un tems même, où cette affreuse coûtume n'étoit que trop autorisée, le Grand Scipion déclara hautement, qu'il ne feroit point tomber sa vengeance sur d'innocens Otages, mais sur les perfides eux-mêmes, & qu'il ne sçavoit punir que des ennemis armés (a). L'Empereur Julien fit la même déclaration (b). Tout ce qu'une pareille Coûtume peut opérer, c'est l'impunité entre les Nations qui la pratiquent. Quiconque la suit, ne peut se plaindre qu'un autre en fasse autant. Mais toute Nation peut & doit déclarer, qu'elle la regarde comme une barbarie injurieuse à la nature humaine.'
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> '(a) Tit. Liv. Lib. XXVIII. cap. XXXIV.
> '(b) Voyez Grotius Liv. III. Chap. XI, Sect. XVIII. not. 2.'

I have extracted the pronouncements of these two authors as illustrating the fundamental maxim that innocent non-combatants are not to be put to death at the will of the enemy. Modern thought has clearly emphasized the distinction between combatants and non-combatants. The combatants are subject to great dangers, and subject to the laws of war; they may be killed. They are, however, entitled to claim certain privileges—for instance, that their lives shall not be taken if they surrender. Non-combatants are on a different footing. It is true that their lives are endangered by military operations. They may lose their lives, for instance, if they come within the deadly range of manœuvres of attack or defence, or military operations generally. The belligerent, if need be, has to show that the operation itself was properly incidental, according to the law of war, to the conduct of the war, and he must do his best to avoid killing the non-combatant population. But it is a different matter deliberately to take and kill the innocent non-combatant. It is contrary to the law of war even to adopt the practice of using non-combatant men, women, and children to act as a screen against the enemy for the advancing or retreating forces. In the Boer War a British general, during the occupation of the Transvaal, issued an order placing on British military trains prominent Boer personages in order to deter attacks by the Boers on these trains. That practice was so emphatically condemned by British opinion that the order was withdrawn in a few days.

I refer to these instances to indicate the profound aversion of humanity towards exposing the innocent non-combatants to the risk of being killed. The practice, however, which is being discussed here, of shooting innocent non-combatants, is much more terrible. They are taken forcibly from the general mass of the population for the mere purpose of being shot either immediately after they are seized or after a delay, during which time they are kept in reserve to be shot if the occupying Power should think it necessary to do so, either to deter the commission of acts of resistance or, if these have already taken place, by way of punishment. In either case the practice amounts to a mere terror killing, and may properly be called terroristic murder. The overwhelming balance of law, expressed by the highest authority, condemns without qualification that course. The occupant has the right of killing, by way of punishment and after a fair trial, actual wrongdoers, that is, the disturbers of the peace of the occupied country. But that is a different matter from terrorist murder.

It has been said that in the whole range of the law of war there is no prohibition of such a practice. I must accordingly digress in order to examine if that statement is true, and I can only do so by looking at the various sources which define on this point what the law is. I have already commenced by citing the two writers of authority whose works are classics of the law of war, and who can be referred to by the courts in the same way as a court of common law would refer to the great authority of such writers as Coke or Blackstone. The next source of authority of the law is Hague Convention No. IV of 1907. The parties to that Convention adopted, with certain minor variations, the earlier Convention of 1899. It has been universally recognized as being the most authoritative guide to the laws of war. It says in the Preamble:

> 'According to the views of the High Contracting Parties, these provisions, the drafting of which has been inspired by the desire to diminish the evils of war, so far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.
>
> 'It has not, however, been found possible at present to concert stipulations covering all the circumstances which arise in practice;

> 'On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in default of written agreement, be left to the arbitrary opinion of military commanders.
>
> 'Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.'

The passage above quoted from the Judgment of the I.M.T. shows how that Tribunal applied the Convention to the facts with which it had to deal, including the practice now in question. It is said that the Convention is silent on the question of killing hostages—I use that word here in its pregnant sense. If that were in fact the case, then the paragraph just cited providing that 'the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations . . .' would obviously bring the rule into effect, but it is not here necessary to rely expressly on this clause of the Preamble because the I.M.T. has held that Article 46 of the Convention is applicable and sufficient. That Article provides that

> 'Family honour and rights, individual life, and private property . . . must be respected.'

These words impose on the occupying forces a positive obligation towards the inhabitants, the protection of whom is a principal object of the whole Convention. A positive obligation to respect individual life necessarily involves an obligation not to take the lives of individual inhabitants except in due process of law. To kill innocent inhabitants arbitrarily is clearly inconsistent with the words of the article, and therefore there is here a clear prohibition against these terror killings. That was the view taken by the I.M.T. It is a view which, I think, ought to be accepted.

There is a further Article which has been referred to, namely, Article 50, providing that

> 'No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.'

Some have characterized Article 50 as a dead letter, and its wording as complete nonsense. I do not think this criticism is well founded. The prohibition must include injurious treatment, by way of penalty, of innocent members of the population unless the whole population, which would include the particular members, can be held to be personally responsible. For that reason Article 50 also serves to supplement Article 46. But Article 46 involves quite definite and categorical prohibition against these terroristic murders of innocent inhabitants, and, as pointed out, it was so regarded by the I.M.T. The Hague Convention has consistently and on all sides during the Second World War, and substantially during the First World War, been held binding as an expression of the recognized principles of the law of war. Accordingly, it has a scope beyond that of a mere treaty or agreement between the actual parties, subject to denunciation at any time by any one of them. For this reason it is not necessary to consider whether the belligerent nation, whose conduct is impugned as being a breach of the Convention, is or is not entitled to dispute its authority on the ground that it never was a party to the Convention, or, if it was, to denounce it. It is binding as a customary or established rule of law on every member of the community of nations.

It is clear that no custom or usage has been established to justify the killing of innocent hostages. The unilateral practice of one nation, Germany, cannot establish a valid custom. The party which founds on the custom must establish it to the satisfaction of the court. In any event a court could not uphold the validity of a custom so repugnant to the dictates of humanity. The very full and careful discussion of the practice, as a matter of fact, which appears in the *Hostages* case, definitely finds that the practice is peculiar to Germany. The words of the Judgment of the Tribunal on this point will be found on p. 63 of vol. VIII of the *Law Reports*. The Tribunal said:

> 'We are also concerned with the subject of reprisals and the detention of members of the civilian population for the purpose of using them as the victims of subsequent reprisal measures. The most common reason for holding them is for the general purpose of securing the good behaviour and obedience of the civil population in occupied territory. The taking of reprisals against the civilian population by killing members thereof in retaliation for hostile acts against the armed forces or military operations of the occupant seems to have been originated by Germany in modern times. It has been invoked by Germany in the Franco-Prussian War, World War I and in World War II. No other nation has resorted to the killing of members of the civilian population to secure peace and order in so far as our investigation has revealed. . . .'

The Tribunal farther on mentioned certain provisions contained in the *Basic Field Manual of Land Warfare* issued in 1940 by the War Department at Washington, and also certain provisions in the *Manual of Military Law* issued in 1929 by the British War Office. In the American *Manual*, paragraphs which have been much discussed appear partly under the heading of 'Reprisals' in paragraph 358, and partly under the heading of 'Hostages' in paragraph 359. Of that latter paragraph the last words are vital: 'When a hostage is accepted he is treated as a prisoner of war', which brings into effect for this purpose the Prisoner of War Convention, and which is certainly inconsistent with any idea that the hostage can be killed for purposes of terrorism.

Under paragraph 358 there is a sub-paragraph, (*d*), the following words of which have been a good deal discussed:

> '. . . Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed. Reprisals against prisoners of war are expressly forbidden by the Geneva convention of 1929.'

The paragraph just quoted is clearly inconsistent with the words of paragraph 359. According to paragraph 359, the hostage is to be treated as a prisoner of war, and I should take that to be the governing phrase. The *Basic Manual* could only be material as evidence of the army's practice, and it is clear that the United States forces have not followed that practice. The same is true of the British and French combatant forces because, as the Tribunal in the *Hostages* case found, no nation except Germany has resorted to the killing of members of the population to secure peace and order.

It is not necessary to discuss here the general question of reprisals outside the simple question of whether the killing of innocent inhabitants can ever be justified as a reprisal. 'Reprisal' is a term of many significations. There are many possible forms of reprisal other than the arbitrary and cruel taking of the lives of the innocent inhabitants of the occupied country who, as we know, are declared by the Hague Convention to be under the protection of the principles of the law of nations. These principles—to say nothing of the established usages among civilized peoples, and the laws of humanity, and the dictates of the public conscience—do not sanction the killing of the innocent inhabitants, whether they are called 'reprisal prisoners' or 'hostages'. So far, then, as the matter depends on an international instrument such as the Hague Convention, there is no authority to justify such proceedings. There is clear authority the other way.

The other similar sources which may be considered in this connexion are public, concerted declarations of principle or policy made by the Allies, in particular those at the end of the Second World War. These pronouncements were no doubt made by victors in the war, and by members of the Allied nations who, it may be said, were not impartial because they had suffered terribly by these proceedings. They are, however, unanimous in their condemnation, and the general law is on their side. I have already referred to the London Charter with its unqualified condemnation of the killing of hostages, and to the approval given to it by the I.M.T. That Charter should be regarded as a declaration of international law because, though it was an agreement to which the original parties were only the four Great Powers, it was acceded to by practically all the Allies. An international agreement or declaration of this character, though it does not carry with it the full force which must attach to the Hague Convention or the Geneva Conventions on the Treatment of Prisoners of War, is the concerted decision of the Allies, and for all practical purposes of the community of nations. Its correctness as an exposition of the international law of war was eventually vindicated by the I.M.T. Moreover, the Charter can claim justification inasmuch as it fulfilled the conditions postulated as essential for the formation of an international law of war, namely, those postulated in the Preamble to the Hague Convention quoted above. What is there postulated comprises merely what has occasionally been called the dictates of natural law, and natural law many eminent thinkers have described as the true foundation of the law of nations, including the law of war. Natural law in this context must mean the rules which flow from the application to the infinitely tangled web of human affairs of the dictates of that sense of right and wrong which is the ultimate justification for the whole system of justice and humanity. That simple sense which is inherent in human nature and universally found, except in barbarous, vicious, or depraved persons, may indeed, as history shows, go astray at times. But it can make its meaning and effect clear in overt forms. To constitute a law, the rule must have been promulgated in a sufficiently general or authoritative form and it must have received recognition and sanction by custom and usage and by being acted upon in the normal course of human conduct. The language of the Preamble to the Hague Convention in simple and concise terms expresses what this means, and I think that is the ultimate guide and sanction for the particular rules which, as it were, canalize the innate principles. In the pronouncements of the Allied nations including not only the London Agreement, but also Control Council Law No. 10 under which the Tribunal which sat in the *Hostages* case and other Military Tribunals derived and exercised their jurisdiction, there was an equally simple and explicit declaration which included the killing of hostages. The United Nations War Crimes Commission consistently treated the killing of hostages—using that phrase as elsewhere here in its pregnant sense—as a war crime. Reference may be made here to the list of war crimes drawn up at the end of World War I by the Commission on Responsibilities at the Conference of Paris in 1919. The second item in that list was 'Putting Hostages to Death'. This followed item No. 1—'Murders and Massacres; Systematic Terrorism', thereby showing the close connexion between the two categories. That Commission was reporting on the crimes actually committed by the Germans in the First World War. In the Report itself it is stated that

> 'In spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage. . . .'

Specific instances are given by way of illustration, in particular:

> '. . . collective penalties, the arrest and execution of hostages, . . .'

The next, subsidiary, source of international law to which it is intended to refer here are the writings of jurists and pronouncements of statesmen. Dr. Alexander-Czeslaw Melen, in an article in the *Revue de Droit international, de sciences diplomatiques et politiques*, published in January 1946 (p. 17), summarizes his conclusions in the following words:

> 'VII. Nous pensons que les conclusions suivantes s'imposent: Non seulement l'occupant n'a pas le droit de mettre à mort des otages, mais, de plus, la pratique même des otages est illégitime et constitue une violation du droit des gens en vigueur, pour les raisons suivantes: 1) elle est contraire au droit des gens coutumier; 2) elle contrevient aux règles établies par la IVe Convention de La Haye (obligatoire seulement dans certains cas); 3) elle est en contradiction avec les principes généraux de droit reconnus par les nations civilisées.'[1]

A distinguished Belgian writer, Dr. Albéric Rolin, says in his book, *Le Droit Moderne de la Guerre*, published in 1920:

> 'Notre conclusion est que des otages ne peuvent jamais être mis à mort. Ils peuvent d'autant moins l'être que leur innocence est, à raison de leur captivité même, une certitude absolue quant aux faits qui se commettent pendant qu'ils sont captifs. Les représailles ne donnent jamais le droit de tuer des innocents, quand on ne peut atteindre les coupables, même *s'il y a des coupables*. . . . Que des innocents puissent avoir à subir les conséquences d'actes d'hostilités qui ne sont pas dirigés contre eux, c'est malheureusement inévitable. Mais rien ne saurait légitimer la mise à mort volontaire et consciente de ceux qui ne prennent aucune part aux hostilités.' (Pp. 319–20.)

James Wilfred Garner, in his well-known treatise *International Law and the World War*, discusses the former practice in the First World War. Though he rightly observes that hostages are not mentioned by name in the Hague Convention, he finds that under the terms of the Hague Convention they are entitled to protection and humane treatment. He refers specifically to Article 46 and Article 50. He says that modern writers are practically all agreed that hostages are entitled to be treated as prisoners of war. They cannot, therefore, be put to death or subjected to severities other than those which may lawfully be inflicted upon regular military prisoners. He adds that the whole German policy with regard to the taking of hostages was contrary to the most elementary notions of humanity and justice which resulted in the punishment of innocent persons for acts for which they could not in any way have been justly held responsible.

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[1] At p. 25. The following passage from the article may also usefully be quoted:

'On peut encore objecter que, si l'institution des otages n'est pas reconnue par le droit des gens coutumier, elle n'est pourtant pas défendue expressément par ce droit. Nous pensons que cette objection ne peut tenir devant les règles et les principes du droit coutumier moderne de la guerre. Il faut admettre comme obligatoire et bien établie depuis longtemps la règle qui considère la guerre comme un rapport entre les Etats; rapport particulier, évidemment, qui consiste en un choc des forces armées. La population civile conserve néanmoins son droit à la liberté et la sécurité personnelles. Le respect de la personne humaine et de la vie humaine dans la personne des non-combattants est un principe fortement établi dans les coutumes admises entre nations civilisées. Vu que la pratique des otages est en contradiction évidente avec ce principe général, et qu'elle n'est pas consacrée par une coutume faisant exception à ce principe général, il faut en conclure que non seulement la mise à mort des otages, mais même la pratique des otages en soi est contraire au droit des gens coutumier en vigueur.' (At p. 22.)

Professor Hyde, in his book *International Law*, vol. III, published in 1945, discusses the question of taking hostages, but does not seem to express a clear view on the question whether they may be killed. He does, however, state 'that a belligerent be obliged to caution its officers in hostile territory, in a definite manner, and with precise directions as to the circumstances when hostages should be taken, and respecting the treatment to be accorded them while held as such'.[1] It is difficult to gather what is his final conclusion on the problem whether hostages can be put to death. He obviously finds difficulty in precisely defining the effect of the War Department Rules of Land Warfare of 1940 quoted above. His conclusion seems to be: 'Possibly it is sought to be laid down that hostages taken for the special purpose announced are not to be treated as prisoners of war.' He adds in a footnote that: 'As they stand, however, the announcements in the rules are believed to leave much to be desired and will doubtless be regarded by some as inconsistent.' It is clear therefore that he gives no countenance to the view that it is legitimate to put hostages to death. As already observed, the Basic Rules do not create an authoritative international law.

The only discordant voice, so far as I am aware, in the condemnation by writers—other than some German writers[2]—of the practice of killing hostages is that of the authors of an article in the *American Journal of International Law* of 1944.[3] But even they insist, in their conclusions, that 'the unilateral practice of hostage-taking has assumed so illegal and inhumane a character through contemporary German abuse'.[4]

There remains the last—but not least—source of law: the decisions of competent courts on the subject. Before the Second World War there had been very few decisions relating to the trial of war criminals. Chief Justice Stone, in *Ex parte Yamashita* (*Law Reports*, vol. IV), refers to the traditional procedure in United States military courts, but there does not seem to be any sufficient record (with possibly a single exception) of the practice of the

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[1] *International Law* (2nd revised ed., 1945), vol. iii, section 700.

[2] Thus Professor Meurer, the principal *rapporteur* of the Commission set up in 1919 by the German Reichstag to investigate charges of violations of the laws of war, justified the indiscriminate killing of hostages. He said: 'In war every one is a sacrificial lamb. What appears to be humane is, from a higher standpoint, often the most inhumane. Is it not the innocent soldier who falls victim to the war crime on the part of the inhabitant, and is not the killing of hostages meant to prevent this? . . . The commander who wishes to be humane may in fact prove very inhumane in relation to the soldiers entrusted to him and thus incur a grave responsibility' (*Das Völkerrecht im Weltkrieg*, vol. ii, p. 221 (as cited by Lauterpacht in this *Year Book*, 21 (1944), p. 85)).

[3] Vol. 38, p. 20. The authors are Miss Hammer and Miss Salven.

[4] At p. 33.

American military courts before the two World Wars. As regards the First World War, the trials at Leipzig were few and very unsatisfactory, and they contain no direct authority on the subject here discussed. Two cases decided in the 'Subsequent Proceedings' at Nuremberg bear on the subject, the *Hostages* case and the *High Command* case. These cases leave the law in some uncertainty. It is not that the courts have given judgment for the accused on the legality of the killing of hostages. The view of the Tribunal in the *High Command* case may be understood from the following quotation:

> 'In the Southeast Case, United States v. Wilhelm List, et al. (Case No. 7), the Tribunal had occasion to consider at considerable length the law relating to hostages and reprisals. It was therein held that under certain very restrictive conditions and subject to certain rather extensive safeguards, hostages may be taken, and after a judicial finding of strict compliance with all pre-conditions and as a last desperate remedy hostages may even be sentenced to death. It was held further that similar drastic safeguards, restrictions, and judicial pre-conditions apply to so-called "reprisal prisoners". If so inhumane a measure as the killing of innocent persons for offences of others, even when drastically safeguarded and limited, is ever permissible under any theory of international law, killing without full compliance with all requirements would be murder. If killing is not permissible under any circumstances, then a killing with full compliance with all the mentioned prerequisites still would be murder.
>
> 'In the case here presented, we find it unnecessary to approve or disapprove the conclusions of law announced in said Judgment as to the permissibility of such killings. In the instances of so-called hostage taking and killing, and the so-called reprisal killings with which we have to deal in this case, the safeguards and pre-conditions required to be observed by the Southeast Judgment were not even attempted to be met or even suggested as necessary. Killings without full compliance with such pre-conditions are merely terror murders. If the law is in fact that hostage and reprisal killings are never permissible at all, then also the so-called hostage and reprisal killings in this case are merely terror murders.'

As will be seen from this quotation the accused were condemned on the count of killing of hostages, but not simply for the mere killing, but on the more complex ground that though they had killed hostages they had done so without fulfilling certain very restrictive conditions or certain rather extensive safeguards. They were therefore in effect held guilty for failing to fulfil these conditions, whereas if they had fulfilled them they might not have been held guilty, and the killing might not have been punishable. I feel very great difficulty in agreeing with this way of looking at the matter. It is certainly true that the odious alternative of holding these terror murders to be legitimate from any point of view has been avoided by the reference to what were held to be the exculpatory pre-conditions, if they were fulfilled, as in fact they were not. There is no suggestion before the *Hostages* case that any such conditions were essential to immunity, or that their fulfilment absolved from guilt. It is equally clear that during the Second World War no German general thought of fulfilling them. They do not all appear to have been put forward either by the prosecution or the defence in the course of the prolonged and extensive proceedings at the trial. They are, however, very fully discussed in the Judgment. However, I have not been able, with all respect, to agree with the Tribunal's decision, that compliance with these conditions could change the essential character of the crime of killing innocent persons which has been so justly condemned as a crime, *per se*, in all the authorities from Grotius downwards that I have adverted to in this article. Both in the *Hostages* case and in the *High Command* case the courts had a further sufficient ground, if the matter was considered on the ground of reprisals, for holding the defendants punishable because of the general disproportion between the reprisals and the alleged criminal acts which were adduced in their justification. But I have been putting the problem throughout on a much wider ground, namely, on the atrocity of killing the innocent, and I say, though with the greatest respect to the judges of the Tribunal which tried the *Southeast* case, who delivered a most valuable and instructive Judgment to which future investigators of this question must turn for guidance, that I am of the opinion that the practice was illegal. Perhaps future courts will adopt the non-committal attitude taken up in the *High Command* case in the passage I have quoted, if, as may be probable, the conditions said to be exculpatory are neglected. The court, however, ought to decide as an international court declaring customary law what the law is on this momentous issue whenever it comes up for decision. The essential character of the offence is something outside the scope of the conditions envisaged by the *Hostages* Tribunal as exculpatory. Certainly no such ground of exculpation was put forward, still less sanctioned, in any of the cases tried before that decision. I may refer, for instance, to the important French decisions in the *Franz Holstein* and *Hans Szabados* cases, in vols. VIII and IX respectively of the *Law Reports*, where the killing of 'hostages' was held to be murder, and, furthermore, deliberate murder (*assassinat*), under the French War Crimes Law.

In the British case of *Kesselring*, reported in vol. VIII of the *Law Reports*, the Judge Advocate in his statement to the Court stated that it was possible to dispose of the case without there being a direct decision on this issue, and he was content to say that the question was left open and not absolutely clear. The Tribunal gave no reasoned judgment and it cannot be said what view they took on this matter. On the other hand, the I.M.T. in the passage I quoted above definitely laid down that killing of hostages is a war crime.[1]

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[1] As to the view taken in Norway in this matter reference may be made to vol. III of the *Law Reports*, p. 84, para. 4, from where it will be seen that the Ministry of Justice in presenting the law on the Punishment of Foreign Criminals to the Parliament, declared that 'there can be no doubt . . . that an execution carried out as a means of reprisals constitutes murder' (Art. 233 of the Civil Criminal Code).

Finally, reference may be made to the interesting judgment delivered in the Netherlands Special Court of Cassation. The judgment was given in the trial of Hans Rauter, head of the Nazi police in occupied Holland, and was delivered on 12 January 1949. It is reported in vol. XIV of the *Law Reports*. One of the counts was the killing of hostages. The Court held the accused guilty. In an elaborate Judgment the Court came to the conclusion that the killing of the Dutch inhabitants in reprisals involved innocent persons, and that any such killing was contrary to the laws of war and constituted the crime of murder. The Court held that all that the occupying Power was entitled to do in such cases was to punish those guilty of the hostile acts if it could lay its hands on them. There lay the limits of its powers; in no case, without exception, were the occupying authorities entitled to take the lives of inhabitants for the deeds of other members of the population.

My own settled opinion, based both on principle and on authority, is that the killing of hostages (which includes reprisal prisoners) is contrary to the law of war, and that it is not permissible in any circumstances, and that it is murder.

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DISPUTED SOVEREIGNTY IN THE FALKLAND ISLANDS DEPENDENCIES

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THE territories of the Falkland Islands Dependencies are the centre of the dispute concerning sovereignty in the Antarctic. Extensive claims to other sectors of the Antarctic, the details of which will be given later, are maintained by Australia, New Zealand, France, and Norway. Owing to the questionable validity in law of the sector principle[1] these other sectors are also potential areas of dispute. The United States, for example, has repeatedly given notice that it does not recognize polar claims which are not supported by actual occupation or use of the territory. Nevertheless, in sectors other than the Falkland Islands Dependencies the sector states have tacitly acquiesced in each other's claims and the titles to these sectors are not immediately a subject of the present dispute.[2] In the Falkland Islands sector, on the other hand, Argentina and Chile advance claims which not only, between them, overlay almost the whole United Kingdom sector but are themselves in conflict. Furthermore, the southern part of the sector has been the scene of important explorations by United States expeditions and the United States undoubtedly regards itself as a potential claimant of territory.[3] Since the end of the Second World War all four states have been active in the sector and the resulting jockeying for position has inevitably created a situation of some tension, more especially between the United Kingdom and the two South American states.

The dispute is momentarily less acute owing to a mutual agreement between the United Kingdom, Argentina, and Chile to refrain from sending warships south of latitude 60° S. during the 1948–9 Antarctic season.[4] This self-denying ordinance is, however, a mere expedient to avert a serious incident and no solution of the actual dispute is yet in sight. The proposal of the United States Government of August 1948[5] that all the states claiming territory in the Antarctic should create some form of international régime within the framework of the United Nations to reconcile their conflicting interests is favoured by the United Kingdom and New Zealand[1] but not apparently by the other five states.[2] Similarly, a United Kingdom proposal that the particular problem of the sovereignty in the Falkland Islands Dependencies should be referred to the International Court has been rejected both by Argentina and Chile, neither of whom are subject to compulsory jurisdiction.[3] At first sight, no dispute could be more suited to judicial settlement than a difference as to legal rights in uninhabited territory. But these two states decline judicial investigation and propose settlement by an international conference. They presumably have the expectation that at a conference any defects in their titles would be lost in legal controversy and ultimately made good by Pan-American politics. Such a supposition at any rate seems a reasonable deduction from the prominence given to the Antarctic question at the Bogota Conference in connexion with proposals for the abolition of European colonies in the Western hemisphere.[4] In these circumstances the United Kingdom not unnaturally continues to insist that the existing legal rights of the parties ought to be ascertained before any political conference is seized of the dispute. Consequently, the dispute, as no one seems anxious to submit it to the United Nations, is at present drifting on from season to season.

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[1] See below, pp. 337 et seq.

[2] Norway promised in 1929 not to contest the claims of the British Commonwealth; see *American Journal of International Law* (referred to subsequently as *A.J.I.L.*), 34 (1940), Suppl., p. 84. France in an exchange of diplomatic notes in 1938 by implication recognized the British Commonwealth claims, when agreeing to reciprocal rights of air passage over Antarctic territories (Treaty Series no. 73 (1938), Cmd. 5900).

[3] See below, pp. 333–4.

[4] Except for routine purposes. South Georgia and the South Sandwich Islands are in fact north of the agreed line but they have not been the subject of the recent competitive activities.

[5] Hansard, vol. 456, *Written Answers*, cols. 10–11.

Whatever may be the political merits of the parties and whatever the political settlement ultimately reached, it is of the utmost consequence to international order that the settlement of a dispute should start from the basis of law. Indeed, it is evident that in the recent jockeying for position in the Antarctic, those states which are wrong in their law may be committing serious breaches of the Charter. This consideration by itself is a sufficient justification for an attempt to assess the respective legal positions of the four states which have been active in the sector claimed by the United Kingdom as the boundaries of the Falkland Islands Dependencies. In addition, the legal issues are themselves of outstanding interest.

Any assessment of the legal position of the respective parties has necessarily to be made on somewhat general lines for two reasons. First, the facts are too detailed to be given here in full. Secondly, not all the evidence is available on which definitive conclusions as to the title to sovereignty would have to be reached. Nevertheless, it is believed that the main facts of the dispute, which are presented in the following pages, give a correct perspective and provide adequate material for a general discussion of the legal principles determining the rights of the parties.

The discussion of the facts and the applicable law will be divided into two separate periods, (1) from early times to the end of the nineteenth century, that is, before states began to exhibit an active interest in the territories, and (2) 1900 to the outbreak of the Second World War. No attempt will be made to set out the confused events of the subsequent period when states have been feverishly trying to improve their position. Nor would it be profitable to try to appraise in detail the legal quality of the various state acts during the past ten years. The vital legal point in the whole dispute is precisely how far valid titles had been acquired by any state before the recent activity began. This activity has consisted of visits of warships, erection of marks of sovereignty (which have usually been removed by the next visitor), printing of postage stamps and other similar acts, and, in a few places, the establishment of temporary or permanent bases ashore. Such acts may have legal significance if the territory concerned was either previously *res nullius* or was already the subject of a title held by the state committing the acts. But, if the territory was already subject to another's sovereignty, such acts are plainly—as the Permanent Court said[1] of Norway's attempted occupation of Eastern Greenland—'illegal and invalid'. The present paper is for this reason limited to an inquiry into the general state of the legal titles to territories of the Dependencies at the end of 1939.

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[1] *The Times* newspaper, 20 January 1949.

[2] Ibid., 19 January 1949.

[3] Hansard, vol. 448, cols. 1684–5.

[4] *The Times* newspaper, 27 April 1948.

Before dealing with the state activity in the two earlier periods it is necessary, first, to refer briefly to the geographical features of the Dependencies and, secondly, to dispose of a contention sometimes advanced that polar territories are in law totally incapable of being taken under sovereignty by occupation.

Geographical Features

The Dependencies comprise five main groups of territory in addition to Coats Land which is part of the Antarctic mainland adjacent to the Norwegian sector and is outside the present conflict of state activity. The five groups with which this paper is concerned are:

1. *South Georgia*, an island slightly south of the Falkland Islands and about 800 miles to the east, that is, farther from the American continent from which it is separated by about 1,000 miles of sea.

2. *South Sandwich Islands*, a group of islands also slightly south of the Falkland Islands but another 1,100 miles farther to the east.

3. *South Orkney Islands*, a group of islands about 700 miles south-east of the Falkland Islands and about the same distance east-south-east of the American continent.

4. *South Shetland Islands*, a scattered group of islands about 600 miles due south of the Falkland Islands, about 400 miles south-east of the American continent, and about 80 miles north of the Antarctic continent.

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[1] (1931) Series A/B, no. 53, p. 64.

5. *Graham Land*, a mountainous peninsula the northern extremity of which is about 500 miles from the American continent. It stretches almost due south for about 600 miles to its junction with the Antarctic mainland. Its west coast is fringed with islands while much of its east coast is inaccessible owing to shelf-ice.

The Graham Land peninsula is, of course, only part of the continental territory claimed by the United Kingdom since British sovereignty is professed over all the territory extending southwards to the Pole between the longitudes 20° W. and 80° W. This hinterland is still virtually inaccessible and therefore not easily made subject to the impact of state activity. The legal status of the hinterland cannot, however, be left out of account in the present paper and will be examined in connexion with the title to Graham Land.[1]

All four island groups and about one-third of Graham Land are north of the Antarctic circle, but all the territories lie to the south of what is known as the Antarctic Convergence; that is, they lie south of the line where the cold Antarctic surface water, as it travels northward, sinks beneath the warmer sub-Antarctic water. This line is clearly defined and apparently constant. The practical result is that all the Dependencies are essentially Antarctic regions with limited ice-free seasons of varying length. The only harbours that are ice-free all the year round are those on the north coast of South Georgia. The fact that access to the territories from the sea is only seasonable is of some relevance in deciding what constitutes an effective occupation.[2]

The territories themselves are barren and dreams of valuable mineral deposits have so far not been substantiated. But the Antarctic seas support stocks of whales and seals which, though they have sometimes been over-exploited, are of considerable economic significance. It is therefore not surprising that the whale and seal fisheries have been the main source of private and state activity in the area.

The Possibility of Acquiring Sovereignty over Polar Regions

Polar lands. The United States writers J. B. Scott[3] and T. W. Balch[4] expressed the view that the polar regions, being incapable or extremely difficult of permanent settlement by man, cannot be brought under sovereignty by effective occupation. Scott concluded that they are *res nullius* while Balch thought that they 'should become the common possession of all the members of the family of nations', in other words, *res communes*. Balch's view was followed by some writers, including

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[1] See below, p. 349.

[2] See below, pp. 336–7.

[3] *A.J.I.L.* 3 (1909), p. 928.

[4] Ibid. 4 (1910), p. 265.

Lawrence,[1] Lord Birkenhead,[2] and Pearce-Higgins,[3] and received the support of the high authority of Fauchille.[4]

The view that polar lands are not susceptible of sovereignty is considered to be quite untenable to-day. Both Scott and Balch were much influenced by the position of Spitzbergen which, though long discovered and frequently visited, was still under no state's sovereignty. This precedent, however, disappeared in 1920 when the sovereignty of the Spitzbergen group was by agreement vested in Norway.[5] Further evidence that the practice of states is against this view is provided by the fact that numerous states have lodged claims to sovereignty over both Arctic and Antarctic regions. Again, as Smedal has pointed out,[6] it is scarcely less difficult to settle permanently in deserts like the Sahara or in mountain ranges such as the Himalayas, but no one has on that account denied that deserts or mountains may be the subject of sovereignty. That barren and virtually uninhabitable lands are in law susceptible of occupation and therefore of sovereignty is also shown by the sovereignty exercised over guano islands and, in particular, by the *Clipperton Island* Award.[7]

The view that polar regions are not susceptible of sovereignty was in fact based on the now-exploded theory that actual settlement or use of territory is essential to its effective occupation. That theory had behind it most respectable authorities; writers of the importance of Vattel,[8] Phillimore,[9] and Oppenheim[10] represent settlement or exploitation as essential to effective occupation. The most recent edition of Oppenheim still asserts categorically that territory can only be taken into possession by settlement upon it and that otherwise the occupation is only fictitious. But this theory has been decisively rejected by arbitral and judicial decisions of the present century. The *Island of Palmas*,[11] *Eastern Greenland*,[12] and *Clipperton Island*[13] cases are clear authority that settlement is not a necessary element in effective occupation.

In the *Island of Palmas* case the island was inhabited by native tribes and the question of settlement being necessary to effective occupation was not precisely raised. The question was, however, the analogous one, whether the establishment of a special local administration was necessary to bring the tribal organization effectively within the sovereignty of the Netherlands. Judge Huber expressly held that the creation of a special administration in the island was unnecessary and that it was enough if the Netherlands showed a 'continuous and peaceful display of actual power'.[1] In numerous passages which are too well known to require citation, he insisted that the test of sovereignty by occupation is the actual, continuous, and peaceful display of state functions in regard to the territory in dispute.[2]

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[1] *International Law*, 7th ed. (1923), p. 150.

[2] Ibid., 6th ed. (1927), p. 93.

[3] See Hall, ibid., 8th ed. (1924), p. 125 (n.).

[4] *Traité de droit international public* (1925), Book I, Part II, p. 658.

[5] See *A.J.I.L.* 14 (1920), p. 232.

[6] *Acquisition of Sovereignty over Polar Areas* (Oslo, 1931; translation by Meyer), p. 32.

[7] See *A.J.I.L.* 26 (1932), p. 390.

[8] *Le Droit des Gens* (Pradier-Fodéré, 1863), p. 491.

[9] *Commentaries on International Law*, 3rd ed., vol. i (1879), p. 333.

[10] *International Law*, vol. i, 7th ed. (1948), p. 509.

[11] See *A.J.I.L.* 22 (1928), p. 867.

[12] (1931), *P.C.I.J.*, Ser. A/B, No. 53.

[13] See *A.J.I.L.* 26 (1932), p. 390.

In the *Eastern Greenland* case, on the other hand, the need for settlement to support effective occupation was directly raised and as directly negatived by the Permanent Court. Denmark was held to have possessed sovereignty over the disputed territory during long periods when no settlements existed at all. Even more significant, the Court upheld Denmark's sovereignty in the most recent, and therefore most important, period, although the settlements in the disputed territory during that period were made by subjects of Denmark's rival, Norway, and although Denmark had not established any local administration over the Norwegian settlements. The Court, in reaching these decisions, acted on the principle that the true tests of sovereignty by occupation are the intention and will to act as sovereign plus some actual exercise or display of sovereignty.[3]

The *Clipperton Island* case[4] goes even farther. A French naval officer, under instructions from the French Government, made a symbolic annexation of this uninhabited, desolate reef, which was afterwards notified to the Hawaiian Government and published in a Hawaiian journal. France took no further step until thirty-nine years later when a French warship again made a visit. Three United States citizens having been found there collecting guano, representations were made by France to the United States Government. A month later a Mexican warship claimed to assert Mexican sovereignty and the dispute was submitted to the arbitration of the King of Italy, who upheld the French claim. The award, after pronouncing that the establishment of a local administration, though usual, is not always necessary, went on as follows:[5]

> 'Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished and the occupation is thereby completed.'

Whether this passage goes too far in attributing to a symbolic annexation of uninhabited territory the full force of an effective occupation will be considered later. But the award is in complete harmony with the other cases in holding that the requisites of effective occupation depend on the circumstances of the territory and that settlement or local administration is not necessarily required in the case of uninhabited territory.

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[1] At p. 896.

[2] E.g. pp. 875–7.

[3] (1931), *P.C.I.J.*, Ser. A/B, No. 53, pp. 45–6.

[4] See *A.J.I.L.* 26 (1932), p. 390.

[5] At p. 394.

The three cases cited above mark a change in the concept of effective occupation which has taken place during the past century and especially since the African Conference of Berlin in 1885. The emphasis has shifted from the taking of physical possession of the land and the exclusion of others to the manifestation and exercise of the functions of government over the territory. This change is a natural consequence of the recognition that in modern international law occupation is the acquisition of sovereignty rather than of property. It follows perhaps even more from the recognition that sovereignty entails international duties as well as rights. Occupation is not only the assumption of the exclusive right to display state activities in the territory. It is also the assumption of a duty to protect within the territory the rights of other states both in regard to their security and in regard to the treatment of their nationals in the territory.[1] The cases make it plain that to-day the decisive test of the effectiveness of an occupation is whether the claimant has in fact displayed state functions in regard to the territory sufficiently to assure to other states 'the minimum of protection of which international law is the guardian'.[1] Accordingly it is effective activity by the state either internally within the territory or externally in relations with other states which is the foundation of a title by occupation, not settlement and exploitation.[2]

The true meaning of effective occupation has been laboured at the outset in order to prevent any misconception about the use of this term, upon which hinges the whole question of sovereignty in Antarctica. Subsequently, it will be necessary to explain the nature and degree of the state activity involved in effective occupation. It is enough for the present purpose that the alleged impossibility of obtaining sovereignty by occupation of polar lands on the ground of their uninhabitability is founded on a false legal premiss.

Polar ice. Balch and a number of other writers take the further point that some polar regions are not land at all but frozen sea. Balch[3] himself rejected the idea that the North Polar ice, which is in slow but continual motion, can be occupied but did not rule out the possibility of immobile ice being made the subject of an effective occupation. J. B. Scott,[4] Oppenheim,[5] and Clute[6] are more sweeping and discount any possibility of frozen ice being occupied outside territorial waters, apparently regarding it merely as high seas in solid form. This was also the view of the United States Government when it declined to endorse Admiral Peary's 'annexation' of the North Pole for the United States.[1] But other writers, such as Rolland,[2] Waultrim,[3] Lindley,[4] Lakhtine,[5] and Smedal,[6] take the view that frozen sea is capable of occupation, though some limit themselves to immobile ice. Hyde[7] regards the fact that states have lodged claims to frozen seas as decisive of the question whether they are susceptible of occupation, despite the strong views of his own Government to the contrary. It may, however, be doubted whether the claims of states under sector declarations are either sufficiently clear in their application to ice or sufficiently well founded in law[8] to conclude the question of frozen seas.

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[1] See *Island of Palmas* Award, *A.J.I.L.* 22 (1928), pp. 867, 876.

[2] The word 'occupation' itself is, of course, a legal term of art; it is the Latin *occupatio* meaning appropriation, not occupation in its sense of 'settling on'. To-day it means, in international law, the appropriation of sovereignty, not of soil.

[3] Ibid. 4 (1910), pp. 265–6.

[4] Ibid. 3 (1909), p. 938.

[5] Op. cit., vol. i, p. 509.

[6] *Can. Bar. Rev.* 5 (1927), p. 21.

In the absence of any judicial authority, it is impossible to pronounce with confidence concerning the status of frozen seas generally in international law. The problem is, in any event, a limited one in the Antarctic because it is improbable that an international court would uphold a claim to sovereignty over areas of sea many miles from land, when these are frozen only for part of the year and are navigable during the remainder. The only permanently frozen seas in the Antarctic are comparatively narrow fringes of shelf-ice permanently attached to the land masses. The best-known example is the Ross Barrier in the New Zealand Dependency, but there is a small ice-shelf on the east coast of Graham Land. The ice terminates in ice-cliffs of considerable height which render much of the coast inaccessible with the result that exploration has for the most part been diverted to the west coast. The chief significance of the ice-packs being held to be legally capable of occupation would be to extend the territorial waters—and with them the exclusive right of whaling farther into the open sea. On the legal issue, the opinion may be hazarded that, even if the Court were to reject the possibility of occupying the landless frozen seas of the Arctic, it might well recognize sovereignty over Antarctic lands as including the shelf-ice. This ice is a mere projection of the land and, indeed, it is not clear how much of the ice is purely frozen sea and how much rests upon a land base.[9] So much having been said, it is emphasized that the legal status of the ice-shelves really plays no significant part in the existing dispute concerning sovereignty in the Falkland Islands Dependencies.

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[1] Hackworth, *Digest of International Law* (1940), vol. i, p. 450.

[2] *Revue générale de droit international public*, 11 (1904), pp. 340–2.

[3] Ibid. 16 (1909), pp. 655–6.

[4] *Acquisition and Government of Backward Territory* (1926), p. 6.

[5] *A.J.I.L.* 24 (1930), pp. 703, 712.

[6] Op. cit., pp. 29–32.

[7] *International Law*, 2nd ed., vol. i (1947), p. 347.

[8] See below, pp. 338–42.

[9] Smedal, op. cit., p. 30.

The Legal Position at the End of the Nineteenth Century

The historical facts. The Papal Bull, Inter Caetera, in 1493 and the Spanish-Portuguese Treaty of Tordesillas in 1494 purported to give all lands discovered or to be discovered west of a line 370 leagues west of the Cape Verde Islands to Spain and all lands to the east of that line to Portugal. The precise longitude of the dividing-line is disputed but even the longitude most favourable to Spain would place South Georgia and the South Sandwich Islands outside the Spanish sphere of interest, though it might be said to include the South Orkneys and Antarctic territory to the west of these islands. The relevance of the Bull Inter Caetera, and of any discoveries made under it, lies in Argentina's pretension to succeed to Spain's rights in the area by 'inheritance'.

There is, in fact, very little evidence of Spanish discoveries or claims within the area covered by the Falkland Islands Dependencies. South Georgia was sighted by the Spanish ship *Leon* in 1756 but this island lay within the Portuguese sphere and in any case had probably been sighted by the Portuguese navigator Vespucci in 1502 and by a British ship in 1675. The Shag Rocks, 180 miles west of South Georgia, also appear to have been sighted by a Spaniard in 1790, but that is about all that there is of Spanish discovery before 1810 when the Buenos Aires Government broke away from Spain. Nor is Spain believed ever to have voiced a specific claim to any of the territories now claimed by Argentina. Nothing is known to the writer of any discoveries by Argentina in her own right during the nineteenth century.

No evidence is available of Chilean discoveries during the nineteenth century.

British activity appears to date from 1775 when Captain James Cook landed on and formally annexed South Georgia in the name of George III. British sealers began operations there in 1778, soon being followed by Americans. In 1819–20 King George and Clarence Islands in the South Shetlands Group were formally annexed. A British sealer, Powell, investigated the South Orkneys and formally annexed the largest island, Coronation Island. In 1829 Hoseason Island north-east of the Palmer Archipelago was formally annexed by H.M.S. *Chanticleer* and in 1832 another island, believed to be Anvers Island, was formally annexed by Captain Biscoe together with the coast of Graham Land. In 1843 Captain J. C. Ross, R.N., formally annexed Cockburn Island and the 'contiguous lands' in North Graham Land for Great Britain. Such were the purported British annexations but there were other British discoveries, including the discovery of Graham Land by Bransfield in 1820.

United States sealers became active in the area about the beginning of the nineteenth century and Palmer was in company with the British sealers who formally annexed King George and Clarence Islands in the South Shetlands in 1819–20. The title of Palmer to have discovered Graham Land and the South Orkneys has been ventilated by some United States writers and attempts have been made to deduce a United States title from the voyages of the American sealers. There is, however, no evidence of any United States annexations or claims of title during the period.

It is right to add that Russian, French, German, Norwegian, and Belgian explorers made particular discoveries in the area during the century. None of these discoveries is believed to have been followed either by annexations on the spot or by claims of title on the part of the governments concerned. The important voyage of the Russian Admiral Bellinghausen, in which he circumnavigated the Antarctic in 1821, has recently been resurrected by the Soviet Union, presumably in an attempt to gain an entrée into any Antarctic Conference that may be convened. It is the sole Russian incursion into the Antarctic and, as will become apparent, it affords a very slender basis for intervening in the dispute.

Legal Evaluation of the Historical Facts

The inter-temporal law. In considering the legal implications of the facts outlined above the so-called inter-temporal law has to be borne in mind. This law means that a 'juridical fact must be appreciated in the light of the law contemporary with it and not of the law in force at a time when a dispute in regard to it arises or falls to be settled'.[1] Thus, in the *Grisbadarna* case[2] the tribunal explicitly assessed seventeenth-century facts in the light of the international law then in force, and in the *Eastern Greenland* case[3] the Court took into account the differing standards of international law when examining the sovereignty of Greenland in the thirteenth and fourteenth centuries. In the *Island of Palmas* case, Judge Huber, from whose award the above statement of the inter-temporal law is taken, not only applied the inter-temporal law in assessing the historical facts in that case but added to it an interpretation which is of the greatest consequence in all questions of discovery and occupation. He emphasized that a distinction has to be made between the creation and the continued existence of rights because:[4]

> 'The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law.'

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[1] *Island of Palmas* case, *A.J.I.L.* 22 (1928), pp. 867, 883; see also Westlake, *International Law, Peace*, 2nd ed. (1910), p. 114, whom the Netherlands cited in their argument.

[2] Wilson, *Hague Arbitration Cases* (1915), pp. 102, 125.

[3] (1931), *P.C.I.J.*, Ser. A/B, No. 53, p. 46.

[4] At p. 883.

And in an earlier passage he said:[1]

> 'The growing insistence with which international law ever since the middle of the eighteenth century has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition *and not equally for the maintenance of the right.* If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connexion with territories where there is an established order of things.'

Numerous other passages in the award stress the need for continuous manifestation of sovereignty to uphold a title to territory to-day. Thus, in the view of Judge Huber, proof even of a perfect title in past times will not, by reason of the inter-temporal law, be enough to establish title to-day because international law has in the meanwhile developed a specific rule that sovereignty must be continuously maintained.

The importance of this interpretation cannot be overstated. It means that an established title may be lost not only by voluntary abandonment but by mere inactivity, that is, by failure to display state activity with a continuity appropriate to the circumstances. The interpretation is a natural corollary to the modern doctrine that sovereignty involves the provision of guarantees for the observance of the minimum standards of international law in the territory. Although the Permanent Court in the *Eastern Greenland* case[2] did not emphasize the requirement of continuity to the same extent as Judge Huber, it treated continuity of display of state authority as an integral element in the Danish title. The Court did not regard it as sufficient for Denmark to establish her sovereignty at a particular moment in history but traced the exercise of sovereignty through successive periods until the critical date when Norway sought to annex the territory. Accordingly, it is believed that the requirement of continuity of display of sovereignty is an established principle of international law.[3] What precisely is involved in continuity of display of sovereignty will be seen in due course.[4]

Papal grants. The Bull Inter Caetera, by itself, is a hopeless root of title to territory in dispute to-day. Indeed, it would be difficult to convince the International Court that papal grants were sufficient to create title as against third states under the international law of the fifteenth and sixteenth centuries. Even Catholic Powers such as France and the England of Henry VII did not regard the Bull Inter Caetera as precluding their own acquisition of territories within the areas granted to Spain and Portugal.[5] The greatest legal effect that can be attributed to the Bull of 1493 and the

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[1] At p. 876.

[2] (1931), *P.C.I.J.*, Ser. A/B, No. 53.

[3] De Visscher, *Revue de droit international et de législation comparée*, 3rd series, vol. 10, pp. 757–62, endorses Judge Huber's doctrine in regard to new or dubious sovereignties but not to old well-established sovereignties. The writer perhaps labours this difference between these two types of sovereignty unnecessarily. Judge Huber recognized that there was little scope for the application of the principle to the territory of old-established states (op. cit., p. 876).

[4] See below, p. 337.

[5] See Westlake, op. cit., p. 95.

Treaty of Tordesillas in the international law of the times is as instruments binding upon Spain and Portugal which determined their respective spheres of new annexations *as between themselves.*[1] Argentina cannot, therefore, look to these instruments as creating any original title in Spain which she herself could 'inherit'. The principles of effective occupation and effective maintenance of sovereignty are in any event insurmountable obstacles to a title based on the papal grant.[2]

Discovery. The United States in the *Island of Palmas* case based itself in part on an alleged Spanish title by a bare sighting of the island in the sixteenth century. Judge Huber, it is true, did not expressly deny the existence of a Spanish title in the sixteenth century, having other grounds for dismissing the United States claim. But he made every reservation as to the correctness of the contention that the international law of the sixteenth century recognized title by bare discovery.[3] Writers are not lacking to support the United States contention. Hall,[4] for example, seems to concede that discovery then gave not merely an inchoate but an absolute title—and it may be urged that Henry VII's instructions to Cabot of 1496 permitted the acquisition only of land *not previously discovered.*[5] But politics and law are even more difficult to disentangle in the sixteenth century than they are to-day and the opinion is preferred that not even at that date was discovery sufficient for title without some form of appropriation. Goebel[6] has pointed out that the opposing view is contrary to the principles of Roman law from which the rules of international law were deduced, contrary to the teachings of leading writers like Bartolus, Gryphiander, and Grotius, and contrary to the weight of state practice. A finder in Roman law did not acquire title by the mere act of detection but by a further act appropriating the thing found, that is, manifesting an assumption of possession. The classical passage in Grotius[7] on discovery accords with the Roman law:

> 'No one is sovereign of a thing which he himself has never possessed and which no one else has ever held in his name. . . . To discover a thing is not only to capture it with the eyes but to take real possession thereof. . . . The act of discovery is sufficient to give a clear title of sovereignty only when it is accompanied by actual possession.'

The equally well-known instruction of Charles V of Spain to his Ambassador in 1523 in the dispute with Portugal over the Molucca Islands[8] is to the same effect:

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[1] They did not altogether prevent disputes even between Spain and Portugal, e.g. the famous case of the Moluccas.

[2] The Netherlands observed in its argument in the *Island of Palmas* case that the very existence of the United States is a living denial of the continued legal value of the Bull of 1493 (see Jessup, *A.J.I.L.* 22 (1928), pp. 735, 741).

[3] Ibid., pp. 867, 883.

[4] Op. cit., pp. 126–7.

[5] See Westlake, op. cit., p. 95.

[6] *Struggle for the Falkland Islands* (1927), pp. 90 ff.

[7] *Mare Liberum* (New York, 1916), p. 11.

[8] Goebel, op. cit., p. 96.

> 'Although Mallucco had been discovered by ships of the King of Portugal, it could not on this account . . . be said that Mollucco had been found by him; for it was evident that to "find" required possession, and that which was not taken or possessed could not be said to be found although seen or discovered.'

Elizabeth in her charter to Raleigh and in her reply to Spanish protests about the actions of Drake went even farther when she insisted on actual and continuous occupation as necessary to title.[1] It is therefore believed to be impossible to establish an original title in the sixteenth or seventeenth centuries accruing from a bare discovery without at least some act of appropriation. Indeed, many who speak of title by prior discovery appear, in fact, to mean by prior appropriation. Judge Huber, it may be said, expressly held even the inchoate title to the Island of Palmas accruing to the Netherlands from symbolic acts of sovereignty such as the establishment of Netherlands flags and arms was preferable to any United States right by bare discovery. The Netherlands acts at any rate showed the *beginnings of an exercise of sovereignty*.[2] This seems correct, for even an inchoate title, being an exclusive right to proceed to effective occupation, requires an *animus occupandi*.

If it is right that prior appropriation rather than prior discovery has always been the true root of an original title to new lands, then all the claimed discoveries in Antarctica up till the end of the nineteenth century—except some of the British discoveries—can be ruled out *a limine* from the present inquiry. The appropriation of these barren and inhospitable lands does not appear to have entered the minds of the individuals who ventured near them; still less did it occur to the governments of the states whose subjects they were. At any rate, neither were formal annexations carried out by the individuals nor claims subsequently made by their governments.

Some of the British discoveries also were attended by no annexation in any shape or form but, as has been seen, there were between 1775 and 1845 a number of purported annexations on behalf of the British Crown which might, at first glance, have provided the basis for at any rate inchoate titles. But here another aspect of the *animus occupandi* has to be considered. The acquisition of sovereignty is a state act and if the act of a discoverer is to have any validity in international law it must be endorsed by the state; the *animus occupandi* ultimately must be that of the state, not of the individual. Accordingly, an annexation to have any effect must either have been carried out under a prior commission from the state or must have been adopted subsequently by the state—through express ratification.[3] Some of the British annexations were the work of serving naval officers; but that is not enough. The officers must either have had the prior authority of the Government to assert British sovereignty or its subsequent approval. Whether, in fact, the annexations received any form of endorsement from the British Government is not known, but in view of the lack of interest in the Antarctic during the nineteenth century it seems improbable that they did.

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[1] Goebel, op. cit., supports the full-blooded occupation doctrine of Elizabeth; but a formal taking of possession by symbolic acts does seem to have amounted to an inchoate title (Von der Heydte, *A.J.I.L.* 29 (1935), p. 448, at pp. 452–62).

[2] *A.J.I.L.* 22 (1928), p. 867, at p. 911.

[3] Westlake, op. cit., p. 99; Scott, *A.J.I.L.* 3 (1909), pp. 938, 939.

Even if any of the interested states were to adduce evidence of appropriation of particular territories sufficient to found inchoate titles, there is the further obstacle that no evidence appears to exist of any attempt to perfect the titles by effective occupation. Whatever may be the truth about the law of discovery and occupation in the sixteenth and seventeenth centuries, it is certain that from the middle of the eighteenth century onwards increasing emphasis was placed on the need to perfect an inchoate title within a reasonable time by effective occupation.[1] An inchoate title, unless carried farther, has the same vice as a sphere of interest; it seeks to exclude the sovereignty of others without providing any of the guarantees for the observance of international law which sovereignty entails. Hence arises the need for effective occupation by further display of state activity of which there appears to have been none in the Antarctic during the nineteenth century.

It has, however, to be conceded that in the *Eastern Greenland* case the Permanent Court said:[2]

> 'It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.'

Furthermore, the arbitrator in the *Clipperton Island* case, in a passage previously cited,[3] appeared to regard a formal annexation of uninhabited territory as a completed 'occupation' provided that it was at once 'at the absolute and undisputed disposition of the annexing state'. This dictum has been welcomed by some writers[4] as a commonsense application of the doctrine of effective occupation to uninhabited territory. But the dictum goes too far if, as appears to be the case, it means that, after symbolic annexation, no further state activity is necessary either to complete *or to maintain* effective occupation of uninhabited territory. The decisive test of a state's title in the modern law is not having the territory at its apparent disposition but the exercise of the functions of a state in a manner appropriate to the circumstances of the territory and to the extent necessary to fulfil the obligations of a state under international law. What that involves in a particular case may well depend on factors other than the presence or absence of inhabitants, e.g. the requirements of neutrality in war-time. Indeed, men may resort to the territory for economic purposes without inhabiting it and so necessitate state activity—as happened in the *Clipperton Island* case. After symbolic annexation, a state must, it is submitted, in some degree manifest its will to act as sovereign and actually exercise sovereignty as and when occasion demands. The decision in the *Clipperton Island* case is believed to be correct because France did, in fact, exercise sovereignty again before Mexico attempted for the first time to assert a title. But France's complete inactivity for thirty-nine years, without even any external manifestation of sovereignty, would surely have been fatal to her claim in the face of an intervening exercise of sovereignty by another state. The Permanent Court, it is to be observed, did not dispense altogether with state activity; it only recognized that state activity may be slight when the territory is uninhabited *and when there is no competing state activity*.

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[1] See *Island of Palmas* Award, *A.J.I.L.* 22 (1928), pp. 867, 884.

[2] (1931), *P.C.I.J.*, Ser. A/B, No. 53, p. 46.

[3] See above, p. 316.

[4] E. D. Dickinson, *A.J.I.L.* 27 (1933), pp. 130–3; Von der Heydte, ibid. 29 (1935), at pp. 463–4.

It is therefore improbable that any formal state annexations that may be proved in the nineteenth century could have greater legal effect than to reinforce a more recent display of state activity in the present century *by the same state*. A prior state act of formal annexation cannot after a long interval prevail against an actual and continuous display of sovereignty by another state. Such is the implication of the language of the Permanent Court quoted above and such was emphatically the view of Judge Huber who said that a continuous and peaceful display of authority would prevail even over a prior definitive title.[1]

Uti possidetis. The Argentine and Chilean claims to have inherited territories of the Dependencies from Spain are in substance invocations of the doctrine of *uti possidetis*. The Latin-American states, when they became independent, tended to break up into the same units as the administrative units of the colonial period, and under the doctrine of *uti possidetis* they claim to-day that their boundaries are those of the former colonial unit as they existed in 1810–21.[2] Thus Argentina claims to have inherited the territory of the former vice-royalty of Buenos Aires and Chile that of the former Captaincy-General of Chile.

The doctrine of *uti possidetis* has proved to be so indefinite and ambiguous that it has become somewhat discredited even as a criterion for settling boundary disputes between Latin-American states.[3] The ambiguity lies in the question whether *uti possidetis* refers to possession *de iure*, that is, to the Administrative boundaries as theoretically defined in Spanish Royal Decrees or whether it refers to possession *de facto*, that is, to the boundaries actually respected by the former colonial administrations. An examination of the historic use of the term *uti possidetis* and of the views of jurists as to its use was said by the Tribunal in the Guatemala–Honduras Boundary dispute not to reveal such a consensus of opinion as would establish a definite criterion for its interpretation in the applicable treaty.[1] Consequently, in the absence of express agreement as to its meaning, there is some difficulty in applying the doctrine even between Latin-American states which subscribe generally to the *uti possidetis* theory of succession from Spain. The difficulty is obviously much greater when one of the disputants is a non-American state which does not subscribe to the doctrine at all.

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[1] See *A.J.I.L.* 22 (1928), pp. 867, 884.

[2] The date varies according to the official date of the establishment of independence.

[3] See De Lapradelle, *La Frontière* (1928), p. 86; see also Fisher, *A.J.I.L.* 27 (1933), pp. 403, 415.

Even if the doctrine of *uti possidetis* be regarded as available to Argentina and Chile in their dispute with the United Kingdom, the absence of any substantial basis for Spanish titles to the Dependencies before 1810 is an insuperable obstacle to its application. The doctrine is in essence a claim by way of succession and if there was no title vested in Spain in 1810, there could be no question of succession by Argentina or Chile. It has already been mentioned that there were no Spanish annexations or discoveries before 1810 which could provide a foundation for Spanish titles to territories of the Dependencies. The only real suggestion of a former Spanish title seems to be the claim in Señor de la Barra's book[2] that Spanish Royal Decrees in the sixteenth century defined Chilean territory as extending southwards from the Straits of Magellan to the Pole. These decrees referred, however, to the Tierra del Fuego which in those days was believed to be the northern tip of a vast southern continent. The decrees are altogether too shadowy evidence of a Spanish title to territories then unknown when, in fact, there was no semblance of Spanish colonial administration over any of the Dependencies.

It is, further, very questionable, in view of the insistence on effective occupation in the nineteenth century, whether the doctrine of *uti possidetis* under any interpretation could compensate for the complete failure of Argentina and Chile to display any form of state activity in the Dependencies in the period following 1810. For there was also no semblance of Argentine or Chilean administration of the Dependencies after these two states had broken away from Spain.

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[1] *Opinion and Award of the Special Boundary Tribunal* (Washington, D.C., 1933), pp. 5–6.

[2] *La Antarctica Chilena* (Santiago, 1944), published as a result of an examination of Chile's Antarctic claims carried out under government auspices. Only a résumé of the arguments in this book has been available to the writer.

There are thus two serious obstacles to the 'historic' claims of Argentina and Chile: (1) the absence of any title in Spain and (2) the absence of any manifestation of Argentine or Chilean sovereignty after 1810. During the nineteenth century there appears, at most, to have been a belief on the part of some Argentinians and Chileans that their countries had claims to southern territories. But that is not enough. A passage in the *Clipperton Island* Award, in which the Arbitrator dealt with an analogous claim by Mexico to a title by succession from Spain, is very apposite:[1]

> 'Even admitting that the discovery had been made by Spanish subjects, it would be necessary to prove that Spain not only had the right, as a state, to incorporate the island in her possessions, but also had effectively exercised the right. But that has not been demonstrated at all. . . .
>
> 'Moreover, the proof of an historic right of Mexico's is not supported by any manifestation of her sovereignty over the island, a sovereignty never exercised until the expedition of 1897, and the mere conviction that this was territory belonging to Mexico, although general and of long standing cannot be retained.'

He then proceeded to hold the island to have been *territorium nullius* in 1858 and therefore susceptible of occupation by France.

The broad conclusion on this period of the dispute is that there are long odds on the International Court holding the whole of the Falkland Islands Dependencies to have been *territorium nullius* when the twentieth century dawned.

The Twentieth Century up to the Outbreak of the Second World War

State activity

British state activity. British state activity between 1900 and 1939 is presented first because it has been on a much more considerable scale than that of other states. This activity was brought to life by the introduction of modern whaling into the Antarctic in 1904. Great Britain in 1905 demanded royalties from Norwegian whalers on all whales caught from the Falkland Islands and from South Georgia. Norway in consequence inquired as to the sovereignty of territories in the whaling area and was informed in 1906 that the South Shetlands, South Georgia, South Orkneys, and Graham Land were British possessions and that applications for whaling licences should be addressed to the Governor of the Falkland Islands. At the same time an ordinance was promulgated by the Governor making it illegal to take whales without licence and imposing royalties.[2] These ordinances, as we shall shortly see, were actively enforced.

In 1908 Letters Patent were issued formally declaring all five territories to be Dependencies of the Falkland Islands and providing for their government by the Executive Council of the Falkland Islands.[1] The preamble defined the Dependencies as follows:

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[1] *A.J.I.L.* 26 (1932), pp. 390, 393.

[2] Falkland Islands Ordinance No. 3 of 1906.

> 'the groups of islands known as South Georgia, the South Orkneys, the South Shetlands, and the Sandwich Islands, and the territory known as Graham's Land, situated in the South Atlantic Ocean to the south of 50th parallel of south latitude and lying between the 20th and 80th degrees of west longitude.'

The Letters Patent were published both in the *Falkland Islands* and *London Gazettes* but evoked no protest from any other state although some parts of the territories had been discovered by their explorers.

In 1917 amending Letters Patent were issued and published[2] to clear away doubts concerning the extent of the territory claimed under the name of Graham's Land and the present definition of the Dependencies runs:

> 'all islands and territories whatsoever between the 20th degree of west longitude and the 50th degree of west longitude which are situated south of the 50th parallel of south latitude; and all islands and territories whatsoever between the 50th degree west longitude and the 80th degree of west longitude which are situated south of the 58th parallel of south latitude.'

The former definition of the Dependencies as consisting of specific named territories was thus replaced by a comprehensive claim to all territories within a stated geographical area. The result is a claim to a sector extending southwards to the Pole but the definition does not seem to have been framed in pursuance of any special sector doctrine. The sector was merely the most convenient geographical definition of the numerous islands and continental territory claimed to constitute the specific territories of the Dependencies.

The Letters Patent were important state acts but, if they stood alone, they would be open to the construction of being merely paper claims. They do not stand alone. Mention has already been made of the Whaling Ordinance of 1906. Amended versions of this ordinance have been in force ever since, the current ordinance having been promulgated in 1936. These ordinances have been effectively applied in all the main groups of the Dependencies to an extent that has varied with the degree and kind of whaling activity. Up till about 1930 numerous licences were granted to, and royalties exacted from, both British and foreign companies for operations from individual territories, the revenue at times amounting to a substantial sum. In more recent years few licences have been taken out owing to the development of pelagic whaling which involves the use of sea-going factory ships instead of bases ashore. The Government of the Falkland Islands attempted from the outset to conserve stocks by limiting the number of whalers licensed and by restricting the taking of calves or of females with calves. This policy did much to conserve stocks until they were threatened by pelagic whalers which were not subject to the ordinances provided that they remained outside territorial waters.[1] The enforcement of the regulations, the collection of dues, and the maintenance of order were achieved through the attendance of magistrates and of customs and whaling officers in the whaling areas during the seasons. Other governmental acts in the territories include the grant of a few leases of land to companies at substantial rents and the maintenance of post-offices temporarily in the South Shetlands and permanently in South Georgia. In addition, the Discovery Committee was set up in 1923 under the auspices of the Colonial Office with the principal function of conducting research into the economic resources of the Antarctic with special reference to the Dependencies. Between 1926 and 1938 the Committee's ships made very many voyages between the various territories and carried out extensive marine research and coastal surveys. Finally, between 1934 and 1937, the British Graham Land Expedition, organized by the Royal Geographical Society and with the financial support of the Colonial Office, carried out extensive and important surveys of the Graham Land peninsula.[2]

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[1] *State Papers*, vol. ci (1907–8), pp. 76–7.

[2] Ibid., vol. cxi (1917–18), pp. 16–17.

The following is a brief summary of the British activity in the five main groups:

South Georgia. In 1905 a two-year lease of grazing and mining rights was granted to a Chilean company. In 1906 a twenty-one-year lease of 500 acres was granted to an Argentine company at a rent of £250 which has been paid to the Falkland Islands Government ever since. Between 1908 and 1911 leases were granted to four Norwegian and three British companies. A stipendiary magistrate has been continuously resident since 1909 and in 1912 police, customs, and post-offices were established. New government buildings were completed in 1925. This is the only territory of the Dependencies which can be called populated, the number being about 750 and mainly of Norwegian stock.

South Sandwich Islands. In 1912 whaling licences were taken out by six Norwegian companies for these islands. Shackleton visited the islands in 1914 and Wild in 1922. A Norwegian company took out a licence for 1927–8 and operated in the area, being accompanied by a member of the Discovery Committee's staff. In 1930 a survey was made by the *Discovery II* and in 1937 a visit was made by the *William Scoresby*. Activity has been much slighter in the case of this group of islands because ice conditions render them very difficult of access. No other state appears ever to have lodged a claim.

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[1] Subsequently, international regulation of pelagic whaling became necessary.

[2] *Geographical Journal*, 91 (1938), pp. 297–312, 424–38.

South Orkneys. In 1903 a British meteorological station was established on Laurie Island but was transferred to Argentine scientists in 1904. Licences covering the whole group were granted to several whaling companies between 1908 and 1915 and there were visits to the islands by customs and whaling officers. During 1920–30 whaling revived and licences were again issued bringing in a revenue of many thousand pounds; a lease of 500 acres of Signy Island was also granted to a Norwegian company at £250 per annum. Seasonal visits were again made by administrative officers and in 1928 by the Governor himself. During this period Argentina erected a wireless station at the meteorological base and the resulting application for a call-sign to the International Telegraph Bureau led to declarations and counter-declarations of sovereignty by Argentina and the United Kingdom. After 1930 the main British activity consisted of surveys by the Discovery Committee's ships in 1931, 1932, 1933, 1934, and 1937.

South Shetlands and Graham Land. Between 1907 and 1910 the South Shetlands and Graham Land were treated by the Falkland Islands Government as separate areas for purposes of whale licences. In 1907 licences were granted to two companies, one Chilean, in respect of each area and by 1910 a number of further companies had received licences. At this time a customs officer was sent with each expedition to enforce the regulations. In 1911, however, the two areas were treated as one for licensing purposes and ten companies received licences covering both areas together. Applications from several further companies were rejected on the ground that the whale stocks could not properly stand the operations of more than ten companies.[1] Control was exercised through customs officers attendant on the whaling fleets until 1912 when the increased number of expeditions made it necessary to alter the control machinery. Every season from this date until about 1930 a customs officer with a magistrate's commission took up residence ashore at Deception Island in the South Shetlands which was made the control port for the combined areas. All whaling vessels under the terms of their licences were required to call there on arrival and to return for clearance papers before taking their departure. Visits of inspection were also made from time to time to some of the anchorages used by factory ships. The area covered by the whalers operating under the control of Deception Island comprised the waters of all the Shetland Islands, the Bransfield Strait, and the west coast of Graham Land together with its contiguous islands to about half-way down the peninsula. There was nothing unreal about the system of remote control from Deception Island; the regulations were consistently and successfully enforced by the resident magistrate.

The Hektor Whaling Company, a Norwegian company, took a twenty-one-year lease in 1912 of land on Deception Island for a shore base which it maintained until 1931. The fuel stocks and installations left by the company indeed remained there until they were destroyed by H.M.S. *Queen of Bermuda* in 1940 as a precaution against visits by enemy raiders.[1] During the period 1927–39 extensive surveys were made both of the South Shetlands and of Graham Land and its islands by the Discovery Committee's ships. Sir Hubert Wilkins under Commission from the Crown made flights from Deception Island over Graham Land and his ship the *William Scoresby* visited the west coast of Graham Land, and some of the adjacent islands.[2] Between 1934 and 1937 the Royal Geographical Society's expedition previously mentioned surveyed first some of the islands off the west coast of Graham Land and then the mainland in the vicinity of Margarite Bay—that is, in the centre of the peninsula. In 1934 Lincoln Ellsworth was authorized by the Governor of the Falkland Islands to make flights over the continental parts of the Dependencies from Deception Island.

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[1] See Cmd. 657 of 1920.

Argentine activity. In 1903 the Scottish National Antarctic Expedition used Laurie Island in the South Orkneys as their base, establishing a meteorological station ashore. W. S. Bruce, the leader, failing to get the necessary funds from Great Britain, offered to the Argentine Meteorological Department through the British Minister to convey four Argentine scientists to the island in his own ship, the *Scotia*, to take charge of the observatory. In 1904 an Argentine team, financed by their Meteorological Department, duly took over the observatory. There was no ceremony of taking possession but the Argentine flag was hoisted over the station and the party came armed with stamps and a special post-mark, 'Orcadas del Ind. Distrito 24'. The latter appears to have been primarily a philatelic speculation and the letters were taken away by the *Scotia* for posting at Cape Town. Rudmose Brown, who was present at the time, wrote afterwards that there was no question of handing over anything except the working of the meteorological station.[3] The precise inferences to be drawn from the transaction depend, however, on the Court's interpretation not only of the facts but of the accompanying diplomatic correspondence which is not available. Whatever the position was in 1904, Argentina later regarded herself as possessing the island. She has maintained the meteorological station ever since.

No comment was made by Argentina on the British Letters Patent of 1908 or 1917 which by their terms extended to Laurie Island. But Argentina's notification to the International Telegraph Bureau in 1925 concerning the call-sign of the wireless station erected on Laurie Island indicated that she claimed all the South Orkney Islands. Not long afterwards she made a formal declaration through the Postal Bureau that Argentine jurisdiction extended *de iure* and *de facto* over the South Orkneys and South Georgia and *de iure* over the Falkland Islands themselves. The claim to be in *de facto* control of South Georgia was extremely fanciful, for, as previously related, this island had long had a resident British administration. It can only have referred to the holding of an Argentine Company, but the lease under which the company held had been granted by the Falkland Islands Government in 1906 which had consistently received, and still receives, rent from the company. It will be observed that the declaration made no claim to the South Sandwich Islands, the South Shetlands, or Graham Land. Great Britain responded by informing the Berne Bureau that all five territories were British. This paper warfare recurred on other occasions, e.g. in the ratifications of the Cairo Postal Conventions of 1934. In 1939 the Argentine Press began to formulate Argentina's claim to a sector, but it does not seem to have been until 1942 that Argentina officially laid claim to the whole sector between longitudes 25° W. and 68° 34′ W. and south of latitude 60° S.[1]

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[1] This act ranks as a strong exercise of sovereignty.

[2] *Geographical Review*, 19 (1929), pp. 353–76; 20 (1930), pp. 357–88.

[3] R. N. Rudmose Brown, *A Naturalist at the Poles* (1923), pp. 172–3.

Such is the outline of Argentina's activity. Laurie Island always excepted, there were no discoveries, no formal annexations, and no display of state activities on the part of Argentina within the territories of the Dependencies before the outbreak of the Second World War.

Chilean activity. Two alleged cases of Chilean state activity are invoked by Señor de la Barra in support of Chile's claim.[2] First, it is said that a Chilean company, the Sociedad Ballenera de Magallanes, conducted whaling operations in the waters of the South Shetlands and of Graham Land between 1907 and 1910. But the operations were those of a private company and were carried out under direct licence from the Falkland Islands Government in accordance with the Whaling Ordinances. Secondly, it is said that two Chilean Decrees, respectively of 1902 and 1906, gave exclusive fishing rights in the waters to the south to named Chilean subjects. But these decrees were not published at the time in the *Official Gazette* which was necessary to give them legal force. Nor is anything known of the concessions being acted on, though at the beginning of the century before the issue of the Falkland Islands Ordinances Chilean sealers may have penetrated into southern waters. The hard fact is that the Chilean company which did operate in the Dependencies between 1907 and 1910 took out a British licence.

In 1907 Chile proposed to Argentina the negotiation of a treaty for the further delimitation of the Chilean-Argentine boundary which would serve to divide between the two countries 'the islands and the American Antarctic Continents'. But Argentina declined and the matter does not appear to have been raised again until 1939. Finally, the expedition of the Chilean ship *Yelcho* in 1916 to rescue the crew of the British ship *Endurance* from the South Shetlands is claimed as an act of administration. Chile generously made the *Yelcho* available for the rescue but the expedition was organized and led by Sir Ernest Shackleton and everyone at the time thought of the expedition as founded on Chilean humanity, not Chilean sovereignty.

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[1] This claim was found by H.M.S. *Carnarvon Castle* on Deception Island in 1943, having apparently been deposited there the previous year by the Argentine vessel *Primero de Mayo*.

[2] Op. cit.

There was in fact no effective display of state activity by Chile until after the Second World War. No comment was made on the British Letters Patent and it was not until 1939 that Chile, stimulated by Argentine and United States interest in the Antarctic, began seriously to consider its own position. A special commission was established[1] whose report resulted in a Presidential Decree of 6 November 1940 which declared:

> 'All lands, islands, islets, reefs of rocks, glaciers, already known, or to be discovered, and their respective territorial waters, in the sector between longitudes 53° and 90° W. constitute the Chilean Antarctic or Chilean Antarctic territory.'

The arguments advanced in support of the decree were primarily geographical and historical. After the war Chile established a base at Greenwich Island in the South Shetlands.

United States activity. United States activity in the present century has been confined to Graham Land, the islands contiguous to its west coast, and the Antarctic mainland. The United States Government, in diplomatic exchanges with both Norway and the United Kingdom, took up the position in 1924 that nothing short of actual settlement or use of Antarctic territory would support a claim to sovereignty.[2] But United States activity does not seem to have begun until 1928 when Byrd's first expedition claimed to have discovered large territories—mainly outside the Falkland Islands sector—on behalf of the United States. The second expedition of 1940–1 occupied a base a few miles from that occupied by the British expedition of 1934–7 in Margarite Bay, making considerable explorations to the south. The Press reported Byrd as saying that 1,000 miles of new coast-line had been charted and that the United States had claims to a million square miles of territory.[3] The Government has still made no official claims beyond reserving the rights of itself and its subjects arising out of the discoveries.[4] But there seems to be little doubt that the second expedition was state-organized, being sponsored by Congress and run under the auspices of the United States 'Antarctic Service'. Furthermore, accounts published by individual members of the expedition disclose that one object was to provide material for United States claims in conformity with the State Department's view that a title by effective occupation requires actual settlement or use of the territory.[1] The validity of this view of the law has already been shown to be questionable.[2]

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[1] On whose work Señor de la Barra's book was based.

[2] See Hackworth, op. cit., vol. i, pp. 399–400 and 457.

[3] *New York Herald Tribune*, 6 May 1941.

[4] Hackworth, op. cit., vol. i, p. 458.

Legal evaluation of the state activity

The legal implications of the state activity outlined above will be examined under three main heads: (*a*) various doctrines of geographical proximity which can conveniently be considered in connexion with the so-called sector claims, (*b*) occupation, and (*c*) discovery. The most important of these possible foundations for title to sovereignty is occupation for two reasons. First, title by effective occupation, that is, by continuous exercise or display of sovereignty, appears in cases of dispute always to prevail over whatever rights attach to proximity or discovery. Secondly, both geographical proximity and discovery, as will be seen later, have little or no legal value if not supported by effective occupation. The latter point makes it necessary to begin our evaluation of modern state activity with a further examination of the requirements of the principle of effective occupation.

The doctrine of effective occupation. The general nature of the doctrine of effective occupation in modern international law has already been explained.[3] Effective occupation is a term of art denoting not physical settlement but the actual, continuous, and peaceful display of the functions of a state. The Permanent Court in the *Eastern Greenland* case did not in fact use the phrase effective occupation but referred to a title derived from 'continued display of authority' involving two elements each of which must be shown to exist. These elements are (1) the intention and will to act as sovereign (i.e. *animus occupandi*) and (2) some actual exercise or display of such authority (i.e. *corpus occupandi*).[4] The first element seems to mean no more than that there must be positive evidence of the pretensions of the particular state to be the sovereign of the territory. This evidence may consist either of published assertions of title or of acts of sovereignty. It is the second element, the rule that there must be a sufficient exercise or display of sovereignty, which requires detailed analysis.

The *Island of Palmas*, *Eastern Greenland*, and *Clipperton Island* cases, the leading authorities on effective occupation, lay down that the exercise or display of sovereignty must be (*a*) peaceful, (*b*) actual, (*c*) sufficient to confer a valid title to sovereignty, and (*d*) continuous. These four points will be considered in turn.

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[1] E. T. Clarke, *Explorers' Journal*, 22, no. 1 (1944), p. 6.

[2] Above, pp. 315–17. See also below, pp. 335–7.

[3] See above, pp. 314–17.

[4] (1931) A/B, 53, pp. 45–6.

(*a*) *The exercise or display of sovereignty must be peaceful.* This rule seems to mean no more than that the first assertion of sovereignty must not be a usurpation of another's subsisting occupation nor contested from the first by competing acts of sovereignty. The Permanent Court held expressly that mere protests from Norway did not alter the peaceful character of Denmark's display of state activity.[1] The peaceful origin of the exercise of sovereignty is, in fact, the element distinguishing occupation from prescription.

(*b*) *The exercise or display of sovereignty must be actual.* This can only mean that the exercise or display must be genuine and not a mere paper claim dressed up as an act of sovereignty. Thus the Arbitrator in the *Clipperton Island* case,[2] whose standard of effective occupation was certainly not exacting, said:

> 'It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.'

It has already been mentioned that the Arbitrator in this case and the Permanent Court in the *Eastern Greenland* case recognized that in thinly populated and uninhabited areas very little actual exercise of sovereign rights might be necessary in the absence of any competition.[3] But neither case gives any countenance to the idea that a mere pretence at exercising sovereignty may constitute an act of occupation. The acts of France in the *Clipperton Island* case were genuine enough. The Permanent Court in the *Eastern Greenland* case not only insisted on both manifestation *and* exercise of sovereignty[4] but, having found that certain treaties demonstrated Denmark's *animus occupandi*, said: 'there remains the question whether during this period she exercised authority *in the colonised area* sufficiently to give her a valid claim to sovereignty therein'.[5] Judge Huber's views were certainly no less strict since for him the touchstone was the provision of guarantees for the observance of the minimum standards of international law in regard to the territory.[6] Accordingly, the Court will, it is submitted, insist on real acts of sovereignty; that is, acts which are either a genuine exercise of domestic jurisdiction in regard to the territory or amount to a genuine international dealing with the territory, e.g. in a treaty. This does not, however, mean that the exercise or display of sovereignty must make a noticeable impact in every nook and cranny of the territory.[1] The density of the acts constituting the exercise or display of sovereignty varies according to the circumstances of each territory and, in particular, according to whether it is inhabited or uninhabited. The rule is satisfied if sovereignty is manifested in regard to the territory as a whole.

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[1] (1931) A/B, 53, p. 62.

[2] *A.J.I.L.* 26 (1932), pp. 390, 393.

[3] See above, pp. 315–16.

[4] (1931) A/B, 53, pp. 46 and 63.

[5] Ibid., p. 52.

[6] *A.J.I.L.* 22 (1928), pp. 867, 876. Numerous passages in his Award emphasize the need for an actual exercise of sovereign power.

(*c*) *The exercise or display of sovereignty must be sufficient to confer a valid title to sovereignty*. The Permanent Court, in evaluating the activity of Denmark during successive periods, measured it each time by reference to the question whether the activity was 'sufficient to confer a valid title to sovereignty'.[2] Although the Court did not elucidate the meaning of this somewhat circular test of sovereignty, it seems not to have had anything more in mind than that the state activity must be such as to show that the claimant really acted as an international sovereign would have acted in the circumstances.[3] Judge Huber's test that the activity must be sufficient to provide minimum guarantees to other states probably means much the same thing and in practice the broad criterion used by the Permanent Court may be easier to visualize and apply.

All are agreed in holding that the degree of state activity required to confer a valid title varies with the circumstances of each territory. Lindley, writing before any of the three modern cases was available, expressed the sense of the rule very clearly:[4]

> 'What is sufficient will depend on all the circumstances. If the territory contains a large population or is one to which a good many traders resort, elaborate administrative machinery may be necessary. If, on the other hand, it is remote or small or incapable of accommodating more than a small or transitory population, a rudimentary organisation may be all that is required; while in the case of small islands used merely for the purpose of a particular business, such as the catching or curing of fish or the collecting of guano, the presence of an official or two may be sufficient.'

One addition has to be made to this passage in the light of the modern cases. When uninhabited or very sparsely inhabited territory is taken into sovereignty, the occupying state may not necessarily be required to maintain even a single official permanently on the spot. It is enough if the state displays the functions of a state in a manner corresponding to the circumstances of the territory, assumes the responsibility to exercise local administration, and does so in fact *as and when occasion demands*.

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[1] *A.J.I.L.* 22 (1928), p. 877.

[2] (1931) A/B, 53, pp. 51, 52, 54, 63.

[3] Verdross's definition of the rule of effectiveness is 'displaying only such activity as would be shown, under analogous circumstances, by any state normally organised' (*Recueil des Cours*, 30 (1929), p. 369).

[4] Op. cit., p. 159.

(*d*) *The exercise or display of sovereignty must be continuous.* It has already been pointed out,[1] when explaining the inter-temporal law, that the Tribunal in the *Island of Palmas* and *Eastern Greenland* cases treated continuity of display of state activity as a constituent element in title by occupation, quite apart from any question of abandonment. Failure to show continuing state activity, which may also be evidence of an intention to abandon a title, will be fatal to the proof of a definitive title by occupation *regardless of intention.*

The degree of the continuity, like the degree of the sufficiency, of the occupation varies according to circumstances. In the words of Judge Huber:[2]

> 'Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed, or again regions accessible from, for instance the high seas.'

In accordance with this principle, a display of sovereignty at irregular and comparatively long intervals was held sufficient for effective occupation both in the *Island of Palmas* and *Eastern Greenland* cases. The *Clipperton Island* case may perhaps also be regarded as a correct though extreme example of the principle. In the polar regions there is one special circumstance which affects the continuity of the display of sovereignty in the regions, namely, the seasonal nature of the access to the regions. But, in any event, the facts that the regions are uninhabited and are susceptible only to very limited forms of human activity inevitably diminish the continuity to be expected in the exercise of sovereignty.

Sector claims. Polar sectors for all states with territories bordering on the Arctic were first adumbrated by Senator Poirier in the Canadian Parliament in 1907.[3] The first declaration of a sector was, however, the issue of the Letters Patent of 1917 defining the Falkland Islands Dependencies. As previously explained, the Letters Patent did not invoke any special doctrine but merely defined territories claimed to be already held by the Crown. The next sector declaration was the Order-in-Council establishing the Ross Dependency in 1923.[4] Reciting that 'the coasts of the Ross Sea, with the islands and territories adjacent thereto, between 160° E. and 150° W., which are situated south of 60° S., *are a British settlement*, within the meaning of the British Settlements Act, 1887', the Order in Council proclaimed all the islands and territories to be the Ross Dependency.

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[1] See above, pp. 320–1.

[2] *A.J.I.L.* 22 (1928), pp. 867, 877.

[3] *Debates of the Senate*, 1906–7, pp. 266 ff.

[4] Issued on behalf of New Zealand (*State Papers*, vol. cxvii (1923), p. 91).

In 1925 a Canadian Act required all scientists and explorers working in the North-West Territories, including the Arctic Territories, to have a Canadian Permit and afterwards the Canadian Minister for the Interior explained that the North-West Territories extended to the Pole.[1] In 1926 the Soviet Union by decree declared to be Soviet territory 'all lands and islands, discovered or to be discovered, which lie between the North Coast of the Soviet Union and the North Pole between 32° 4′ 35″ E. and 168° 49′ 30″ W. and which are not recognised to belong to a third state'.[2] In 1933 the large Australian Antarctic sector comprising 'all the islands and territories other than Adélie Land situated south of 60° S. and lying between 160° E. and 45° E.' was declared. The Order-in-Council simply stated that these were territories 'over which His Majesty has sovereign rights'.[3] But the proceedings of the Imperial Conference of 1926 show that British titles to the coasts of the sector were regarded as already existing in virtue of discovery.[4] Adélie Land, which France claimed on the basis of a discovery in 1840, was first placed by decree under the Government of Madagascar. In 1938 a further decree defined Adélie Land as 'the islands and territories situated to the south of 60° S. and between 136° E. and 142° E.'.[5] In 1939 Norway by Royal Proclamation[6] declared that 'the mainland coast in the Antarctic extending from the limits of the Falkland Islands Dependencies in the west (the boundary of Coats Land) to the limits of the Australian Antarctic Dependency in the east (45° E.) with the land lying within this coast and the environing sea', was to be 'brought under Norwegian sovereignty'. A minute by the Ministry for Foreign Affairs[6] explained Norway's right to the land as being based on Norway's explorations of the coast and the interior and on Norwegian whaling in the adjacent waters. The minute also referred to a promise given by Norway to Great Britain in 1929 that it would not claim any land previously brought within the British Empire. Finally in 1940 and 1942 respectively Chile and Argentina lodged their sector claims in competition both with each other and with the Falkland Islands Dependencies, the claims being supported primarily by historical and geographical arguments.[7]

Impressed by the volume of state practice in the making of sector claims, Reeves expressed the view that 'the sector principle as applied at least to Antarctica is now a part of the accepted international legal order'.[8] It is, however, scarcely possible to regard state practice as sufficiently certain and

[1] *Canadian House of Commons Debates*, 1925, p. 4238.

[2] Hackworth, op. cit., vol. i, p. 461; Smedal, op. cit., p. 69.

[3] *State Papers*, vol. cxxxvii (1934), p. 754.

[4] Cmd. 2769, pp. 33–4.

[5] See Hackworth, op. cit., vol. i, pp. 459–60.

[6] *A.J.I.L.* 34 (1940) (Suppl.), p. 83.

[7] See above, pp. 332–3.

[8] *A.J.I.L.* 33 (1939), pp. 519, 521.

general to establish a new rule of international law. The United States, a potential claimant in both the Arctic and Antarctic, has consistently denied that sector claims have any legal force.[1] Neither Norway nor Denmark has claimed Arctic sectors. Nor have non-sector states given any recognition to the legality of sectors. On the contrary, Nazi Germany was showing signs of claiming part of Norway's sector,[2] and Japan entered a reservation on hearing of Chile's declaration.[3] Moreover, Chile and Argentina are contesting the United Kingdom's sector. It is therefore necessary to examine what other legal content there may be in sector claims.

It seems to be common ground that mere paper annexations of territory can have no legal significance unless made the subject of a treaty and then only between the contracting parties. Sectors are, however, usually represented to be not mere paper annexations but applications of the principle of geographical proximity, whether expressed as the principle of 'contiguity' or of 'continuity' of territory. How far geographical proximity is entitled to be regarded as a legal principle will be discussed in a moment. As, however, there appears to be some misconception concerning the precise nature of the proximity arguments, particularly in the Antarctic, it is first necessary to analyse those arguments.

Arctic sectors are usually justified as being extensions northwards to the Pole of continental land masses which already project into the Arctic circle. Such was the basis on which Senator Poirier argued for a Canadian sector and such appears also to be the basis of the Soviet declaration.[4] Even before 1926 Russia had claimed the islands north of Siberia on the ground that they were the 'northern continuation of the Siberian continental shelf'. Lakhtine, in supporting the legality of the Soviet sector, uses another phrase—'a region of attraction'.[5] But he does not appear to mean by this phrase anything very different from geographical proximity for he also refers to the territories within the sector as territories contiguous to the Soviet Union. It is clear that the sector claims of Canada and the Soviet Union, at any rate when first formulated,[6] were in conflict with the established principle of international law which demands effective occupation of newly acquired territories. But it is also sometimes urged that in the special conditions prevailing in the polar areas the states with continental polar territory have the best, if not the only, chance of bringing the more northerly areas under control and that therefore sectors may be justifiable in law.

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[1] See Hackworth, op. cit., vol. i, pp. 463–4.

[2] Reeves, *A.J.I.L.* 33 (1939), p. 520.

[3] Señor de la Barra, op. cit., pp. 176–7.

[4] Smedal, op. cit., pp. 54–9.

[5] *A.J.I.L.* 24 (1930), p. 703.

[6] Subsequent state activity may in part have remedied this defect.

A glance at the map of the Antarctic shows at once that its geographical features are not the same as those of the Arctic. No continental land masses project from the temperate zones into the Antarctic and, as Hyde says, 'the south polar region is itself a continent that stands aloof and detached from any other'.[1] Some writers in consequence regard Antarctic sectors as essentially different from Arctic sectors, the Antarctic sectors not being, in their view, continuations of, or contiguous to, territory of the claimant states. Hyde[1] says outright that Antarctic sectors offer no room for the invocation of theories of continuity or contiguity and therefore lack the foundation on which sectors rest in the Arctic. He maintains that Antarctic sectors are not dependent from land possessed by the claimant states but are areas within lines of longitude drawn from the South Pole at angles arbitrarily chosen to include the territories coveted.

The geographical differences in the Arctic are not without importance as they may affect the capacity of the sector state effectively to exercise the powers of government in the sector. But the view that Antarctic sectors are fundamentally different from those in the Arctic is believed to be wrong. In the first place, the geographical differences are perhaps exaggerated because even in the Arctic there is a considerable separation of the claimed territories from the nearest continental land masses. In the second place, the Antarctic sectors are not entirely arbitrary but are framed as geographical extensions of land claimed, whether rightly or wrongly, to be already under the sovereignty of the sector states. The form in which the sector declarations came to be made appears to have led to much misunderstanding as to the nature of Antarctic sectors. The fact that the declarations have contained both claims to Antarctic territory and provision for its administration from lands outside the Antarctic has led to the supposition that the sectors purport to be geographical extensions of the administering territory. Jessup, for example, refers to the Falkland Islands Dependencies as resting upon a 'projection of longitudinal lines outward from the Falkland Islands'.[2] If this were so, Antarctic sectors would indeed be arbitrary, for the map shows at once that their lines of longitude bear no relation to the longitudes of the administering territories. But, in fact, the land bases from which the sectors project and which determine the angle at the Pole are strips of the coast of the Antarctic continent to which the sector states claim title by occupation or discovery.[3] Whatever comment may be made on the origin of some of the titles,[4] these coastal strips are the foundations of the Antarctic sectors of the United Kingdom, Australia, New Zealand, France, and Norway.[1] It is true that the sectors are expressed to begin north of the continent[2] and that they even appear to include areas of the high seas. But the high seas are not in fact claimed and the projection of the sectors north of the continent only serves as a convenient means of bringing under a single geographical definition both the continental sector and individual islands to which *specific* titles are also professed. This is well illustrated in the case of the Falkland Islands Dependencies where the British claim has from the first comprised four specific groups of Islands and Graham Land, the sector being included in the 1917 Letters Patent to mark the extent of the claim to Graham Land and its contiguous islands.[3]

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[1] Op. cit., vol. i, p. 350.

[2] *A.J.I.L.* 41 (1947), pp. 117–19. Von der Heydte makes the same error in regard to the Ross Dependency: loc. cit., p. 470.

[3] See pp. 337–8 above.

[4] The French title to Adélie Land was particularly thin (see Hackworth, op. cit., vol. i, pp. 459–60).

In short, the essence of the Antarctic sectors of the United Kingdom, Australia, New Zealand, France, and Norway is to define the boundaries of their mainland territories.[4] These sector claims are therefore based fundamentally on the principle of geographical continuity of territory. Indeed they are nothing more or less than new examples of the old hinterland doctrine.

Arctic sectors, although they also are based on the principle of proximity, are really examples of another proximity doctrine, 'contiguity'. Therein lies the main difference from a legal point of view between the Arctic and Antarctic sectors. 'Contiguity' is the name given to the doctrine sometimes invoked in support of claims to islands lying near to a state's territory but outside its territorial waters.[5] The mere proximity of the island to the claimant state is represented as a geographical connexion between the two lands and as a ground for including the island within the sovereignty of the nearby state. It is evident that the belated Chilean and Argentine claims to sectors in the Antarctic have more in common with the Arctic sectors than with the other Antarctic sectors. They are, quite plainly, contiguity claims, not being founded on the occupation or even discovery of Antarctic territories. As the territories claimed are separated from South America by a considerable expanse of sea, the argument of contiguity is reinforced by reference to geographical similarities with the implication that the disputed territories are geologically united with South America.[6] But there can be no question about the Chilean and Argentine sectors being essentially contiguity claims.

It is not believed that either form of sector doctrine can by itself be a sufficient legal root of title. The hinterland and contiguity doctrines as well as other geographical doctrines were much in vogue in the nineteenth century. They were invoked primarily to mark out areas claimed for future occupation. But, by the end of the century, international law had decisively rejected geographical doctrines as distinct legal roots of title and had made effective occupation the sole test of the establishment of title to new lands. Geographical proximity, together with other geographical considerations, is certainly relevant, but as a fact assisting the determination of the limits of an effective occupation, not as an independent source of title.

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[1] Smedal, op. cit., p. 60, correctly interprets the Antarctic sectors; the Falkland Islands sector is based on 'occupation' rather than discovery.

[2] At 60° S. except in the Falkland Islands Dependencies where part begins at 50° S. and part at 58° S.

[3] See above, pp. 337–8.

[4] Plus their island fringes.

[5] *Island of Palmas* Award, *A.J.I.L.* 22 (1928), pp. 867, 893.

[6] The geological arguments are developed at length by Señor de la Barra.

Any pretensions of the hinterland doctrine to give legal title were scotched once and for all by Article 35 of the General Act of the Berlin Conference of 1885 which recognized an obligation in an occupying state to exercise authority in the areas occupied. For Article 35 has ever since been accepted as declaratory of a general rule of international law.[1] Hinterland claims, not reinforced by effective occupation, are political acts which can only be given legal content by being made the subject of a treaty—and then only between the contracting parties.[2] In the Antarctic there appears to be an understanding between some of the sector states but no treaty[3] and in any case the states which now contest the United Kingdom's right to the Dependencies are outside even that understanding. Sectors of the hinterland type are therefore a very frail foundation for sovereignty in the Antarctic.

The authority against contiguity being a legal doctrine is even more conclusive. The United States in a series of disputes concerning islands off the American continent successfully maintained the position that only exercise of sovereignty and actual possession of islands outside territorial waters could give title. The doctrine of contiguity goes back to Bartolus but became untenable with the growth of the rule of effective occupation. Judge Huber, in repudiating the doctrine in the *Island of Palmas* case, expressed the modern view as follows:[4]

> 'It is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearings to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even governments of the same state have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one state rather than another, either by agreement between the parties or by a decision not necessarily

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[1] Writers are almost unanimous on this point.

[2] See the exchange of notes between Lord Salisbury and the United States Secretary, Olney, in 1896 (Moore, *International Arbitrations*, vol. i (1898), p. 974, and esp. pp. 979–80).

[3] There has been a tacit acceptance of boundaries among the Commonwealth states, France, and Norway.

[4] *A.J.I.L.* 22 (1928), pp. 867, 893.

> based on law; but as a rule establishing ipso iure the presumption of sovereignty in favour of a particular state, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other states from a region and the duty to display therein the activities of a state. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results.'

Judge Huber in a later passage in his award said roundly that 'the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law'.[1] Contiguity, when invoked as a justification for territorial claims apart from effective occupation, has in his view no legal basis and is at bottom a political claim of the sphere of interest type. The sole legal test of the acquisition of sovereignty over new territories is effective occupation in the shape of effective display of state activity.

Judge Huber recognized that, where effective display of sovereignty over some territory can be proved, geographical continuity or contiguity may be a relevant fact in assessing the extent of the territory affected by the display. The United States had contended that the island of Palmas belonged geographically to the Philippines group, over which Spain undoubtedly exercised sovereignty, and that it was covered by the Spanish display of sovereignty. Judge Huber, although he dismissed the United States contention on the facts, conceded that under certain circumstances a group may be regarded as in law a unit so that possession of its principal part may in the initial stages of an occupation carry the rest of the group.[2] But he insisted that ultimately the display of sovereignty must make itself felt through the whole territory.

The judgment of the Permanent Court in the *Eastern Greenland* case does not, it is submitted, conflict at all with the views of Judge Huber as to the non-legal character of the proximity doctrines. Professor Ross in his recent book[3] implies that the Court, while paying lip-service to the principle of effective occupation, in fact applied the doctrine of continuity. But this is a rationalization of the result of the decision which disregards the expressed *ratio decidendi* of the judgment. Arbitral decisions of the present century have established beyond all doubt that 'effective occupation' does not mean physical settlement of the territory but effective display of state activity. If this vital point is remembered, the *Eastern Greenland* case presents no difficulty and no conflict with the principle of effective occupation. The Court did not hold Denmark to have sovereignty over Eastern Greenland merely by reason of it being a continuation of other territory possessed by Denmark; nor did it do so merely because Greenland, being an island, is a geographical unity. The Court held Denmark to have actually displayed state authority in regard to the whole of Greenland, slight though the impact of that authority might have been in the contested part of the island. It treated Denmark as having shown not a constructive but an actual 'occupation' of Eastern Greenland. The geographical unity of Greenland was an important fact in assessing the limits of Denmark's state activity, but it is plain from the judgment that geographical continuity would not have availed Denmark in the least if she had not established some *state activity displayed in regard to the whole island.*

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[1] *A.J.I.L.* 22 (1928), p. 910.

[2] Ibid., pp. 867, 894; see below, p. 348.

[3] *A Textbook of International Law* (1948), pp. 146–7.

In short, any significance that has been attributed by international tribunals to proximity has been not as a legal principle independent of effective occupation but as a fact indicating the extent of an effective occupation. It is true that the United States, in the Truman Proclamation on the Continental Shelf, appears to invoke mere contiguity as a *legal* ground of title to the resources of the sea-bed.[1] If so, the Proclamation is in direct conflict with numerous previous utterances of the United States concerning contiguity and continuity and merely serves to illustrate the observation of Judge Huber:[2]

> 'The alleged principle itself is by its very nature so uncertain and contested that even governments of the same state have on different occasions maintained contradictory opinions as to its soundness.'

Whether the Truman Proclamation, owing to the special considerations involved in claims to the resources of the continental shelf, can be brought within the existing principles governing the acquisition of territorial rights is a question which must be left for examination on a future occasion.

International law therefore appears to take account of continuity or contiguity of territory only within the principle of effective occupation.[3] Within that principle proximity may, in certain circumstances, operate to raise a presumption of fact that a particular state is exercising or displaying sovereignty over outlying territory in which there is no noticeable impact of its state activity. Having regard to the importance attached by international law to an occupation being 'effective', it is evident that the geographical circumstances must be such as to raise a strong, if not compelling, presumption that the state has both the intention and ability to exercise sovereignty. Even so, it is doubtful whether contiguity is then a complete substitute for effective occupation. There is certainly some authority, including that of Judge Huber,[4] for the view that, on a first annexation of part of territories which form a geographical unit, the annexation extends by presumption to the whole unit. But Judge Huber insisted that the presumption only operates in the initial stages and that, when title is claimed by a continuous and prolonged display of sovereignty, there must be some manifestation of sovereignty throughout the territory claimed. In other words, proximity only constitutes presumptive evidence of an assumption of sovereignty which is rebutted by a failure to provide any positive evidence that sovereignty is asserted during a period of time in which some display of sovereignty would ordinarily be called for. This view, though criticized by Jessup[1], is considered to be entirely correct and in harmony with the principles applied by the Permanent Court in the *Eastern Greenland* case. The *animus occupandi* cannot be left indefinitely a matter of presumption and conjecture. On the other hand, when there is some manifestation of the *animus occupandi* by a display of sovereignty, the continuity or contiguity of the outlying areas serves to give actuality to that display. The proximity then prevents an otherwise bare display of sovereignty, with no noticeable impact on the outlying areas, from being rejected as a mere paper claim. The proximity, by raising a presumption of an actual intention and ability to control the outlying areas, operates to give the claimant the benefit of the rule that an effective occupation need not make an impact in every nook and cranny of the territory.[2] But this presumption, being merely one of fact, may be rebutted by contrary evidence, as, for example, that there has been a continuous and peaceful exercise of sovereignty in the disputed areas by another state.[3]

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[1] *A.J.I.L.* 40 (Suppl.) (1946), pp. 45–7.

[2] Ibid. 22 (1928), pp. 867, 893.

[3] This is also the conclusion of Von der Heydte, ibid. 29 (1935), pp. 462–71, who first says that contiguity is a full and sufficient sovereign title but then subordinates contiguity to the principle of effective occupation.

[4] Ibid., 22 (1928), pp. 867, 894; cf. Lawrence, op. cit., p. 152.

If the above appreciation of the place of continuity and contiguity in international law is correct, sector claims in the Antarctic, being merely forms of continuity or contiguity, can have no legal significance independently of an exercise or display of state activity in regard to the sector. It is also questioned whether the Court would accept sector lines as factually significant in determining the extent of an effective occupation of the Antarctic. Lines of longitude are somewhat arbitrary indications of geographical unity, taking no account of physical features such as glaciers, mountain ridges, or sled routes. Yet it is just conceivable that in the desolate, uninhabited areas of the South Pole the Court might accept sectors as a convenient method of defining the extent of the area covered by an effective occupation of any part of the coast of the Antarctic mainland. Whatever view the Court may take of the British sector declarations as definitions of territorial propinquity, the declarations, according to the existing authorities cannot possess any legal value unless the Court is first satisfied that there has been a manifestation of sovereignty over the whole sector and a display of state activity in principal parts of the sector sufficient to raise a presumption of effective occupation of the whole.

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[1] See below, p. 349.

[2] This appears also to be the view of Von der Heydte, loc. cit., pp. 465–71, though he seems not to regard manifestation of sovereignty over the contiguous areas to be necessary.

[3] See below, p. 349.

The Chilean and Argentine sectors, whatever be the truth about the place of contiguity in international law, seem quite incapable of being brought within the concept of contiguity at all. The sectors do not form a natural geographical unit with Chile and, still less, with Argentina, even if geological similarities can be proved. Not only is the Antarctic continent itself a natural unit but both the continent and the island groups are separated by large distances from South America. Considerations such as these led Judge Huber to reject the United States appeal to contiguity in the *Island of Palmas* case.[1] Moreover, in the Brazil–British Guiana Boundary Dispute the Arbitrator declared that 'the effective possession of a part of a region, although it may be held to confer a right to the acquisition of the sovereignty of the whole, cannot confer a right to the acquisition of the whole of a region which either owing to its size or to its physical configuration cannot be deemed to be a single organic whole *de facto*'.[2] The suggestion that Antarctica is a single organic whole with South America is simply not sustainable. In short, the degree of proximity and the other geographical circumstances fall far short of what is necessary to raise a presumption in favour of either country of an intention and ability to exercise sovereignty in the disputed areas.

Finally, attention is drawn to Judge Huber's insistence that display of sovereignty is always to be preferred to mere proximity. In one passage in the Island of Palmas Award he said:[1]

> 'It is, however, observed that international arbitral jurisprudence in disputes on territorial sovereignty (e.g. the award in the arbitration between Italy and Switzerland concerning the Alpe Craivarola) would seem to attribute greater weight to—even isolated—acts of display of sovereignty than to continuity of territory, even if such continuity is combined with the existence of natural boundaries.'

And in a later passage he declared that even an inchoate title arising from a first display of state activity would 'prevail over any claim which in equity might be deduced from the notion of contiguity'.[3] Consequently, even if there were any substance in the Chilean and Argentine arguments based on contiguity, they could not prevail against an effective occupation by display of state activity by a third state.

Effective occupation. If sector claims are not by themselves a sufficient legal root of title, only discovery and occupation are left as possible foundations for Antarctic titles. Moreover, in the present dispute, if the assumption that the discoveries of individuals in the eighteenth and nineteenth centuries have evaporated through the failure of states to adopt or to maintain them is correct, occupation falls to be considered before discovery. For Great Britain at the opening of the present century attempted to assert sovereignty over the whole area. But, with the exception of the Argentine meteorological station on Laurie Island, none of the other three claimants undertook any significant activity in the Dependencies until at least 1925, although the development of whaling plainly called for state activity. By this date the British title by occupation, if well founded, was fully established. From 1925 onwards Argentina began to make paper claims to other territories besides Laurie Island, though she does not seem to have displayed any substantial state activity in regard to the other territories until as late as 1942 when the Argentine transport *Primero de Mayo* deposited an 'act of possession' on Deception Island in the South Shetlands. United States discoveries of the present century do not date before Commander Byrd's first expedition in 1928. Chile did not even formulate her claim until 1940 and her first official act in the area seems to have been the dispatch of an observer to accompany an Argentine expedition in 1943. If Great Britain's earlier assertions of sovereignty amounted to an effective occupation, then any subsequent activity of the other three states in the areas comprised in the effective occupation would be illegal and invalid.[1] Consequently, the critical legal questions in the whole dispute are considered to be whether, and over what areas, Great Britain had established effective occupation in the first quarter of this century.

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[1] *A.J.I.L.* 22 (1928), pp. 867, 894.

[2] *State Papers*, vol. xcix (1905), p. 930.

[3] *A.J.I.L.* 22 (1928), p. 911.

It has been seen that a state, in order to establish a title by occupation, must show an exercise or display of sovereignty which is (*a*) peaceful, (*b*) actual, (*c*) sufficient to confer a valid title, and (*d*) continuous. British state activity during the period in question is believed to have fulfilled these conditions in many areas. Leaving aside the particular problem of Laurie Island, there can be no real doubt about the peaceful nature of Great Britain's assumption of sovereignty. Not only was there no other state exercising sovereignty in the region when British occupation began but no other state made any attempt to compete within the region during all this earlier period. Again, the character, the volume, and the continuity of the British state activity satisfied much more exacting standards of effective occupation than those accepted in the *Island of Palmas*, *Eastern Greenland*, or *Clipperton Island* cases. A genuine system of administration was set up in 1908 and legislation has been continuously in force regulating the chief form of human activity in the area, namely, whaling. Licences, leases, and concessions were both granted and acted on. Magistrates and customs and fisheries officers exercised their functions in the region and, if the exercise of their functions was seasonal or occasional, this fact is explained precisely by the circumstance that, owing to the polar character of the region human activity is seasonal or occasional. Scientific and survey expeditions were also sent to the various territories under government auspices.

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[1] If British activity in the Dependencies between 1900 and 1939 is examined in the light of the requirements of effective occupation, which have been previously explained, it will be apparent that in some areas at least a strong claim can be made out to sovereignty by effective occupation. As to Great Britain's intention and will to act as sovereign in the Dependencies, there can be no question, because it is amply demonstrated in the two Letters Patent, in the Ordinances, and in her diplomatic activity. The only question that has to be considered is therefore whether she *exercised or displayed her sovereignty* sufficiently to gain a title by occupation.

Great Britain was in fact the only state which during this period set out to administer the area and thereby to provide guarantees for the observance of the minimum standards of international law. This she did, in particular, by regulating the one human activity of any economic significance, the whaling, and, in so doing, made a positive contribution to the preservation of the natural resources of the area. It is therefore believed that the Permanent Court, if seized of the dispute in 1939, would have felt constrained to hold that the United Kingdom possessed a title to the Dependencies by effective occupation, subject only to two points. These points, which will now be examined, are (1) the effect of Argentina's tenure of the meteorological station on Laurie Island and (2) the extent of the area effectively occupied by Great Britain in Graham Land and its contiguous islands.

Laurie Island. Argentina has been protesting a title to Laurie Island adverse to Great Britain for some years and has kept the small staff of the meteorological office (about four in number) resident in the Island since 1904. Whether in fact Argentina acquired a title to Laurie Island in 1904 is, as has been said, a matter of evidence which cannot be investigated here. But, if Argentina's claim were to be upheld, the interesting question of law would at once arise whether her title also extended to the remainder of the South Orkneys group—which again introduces the doctrine of contiguity. The view has been expressed above that contiguity, although it has no foundation in international law as an independent root of title, may be relevant in assessing the area over which sovereignty, otherwise created, in fact extends.[1] In particular, where occupation of one area is proved, the geographical unity of the territory may be relevant to the extent of the occupation. Judge Huber in the *Island of Palmas* case dealt with the precise issue of the geographical unity of a group of islands as follows:[2]

> 'It is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory and, on the other hand, the display of

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[1] Above, p. 343.

[2] *A.J.I.L.* 22 (1928), pp. 867, 894.

sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory.'

Jessup criticizes the distinction drawn by Judge Huber in this passage as 'hard to follow'.[1] Judge Huber, as previously explained, seems to have meant that, whereas the first annexation of one island may create a *temporary presumption of fact* that sovereignty is claimed and exercised over the whole group, this presumption, as time goes on, will be displaced by a failure to display sovereignty in regard to the whole group. If there is a difference between the views of Jessup and of Judge Huber, it must be that Jessup regards the presumption as being displaced by a failure to display state activity only when there is a competing display by another state. For Jessup expressly recognized that any presumption of control arising from geographical propinquity cannot prevail against the continuous and peaceful display of authority by another state. But, as has already been pointed out, the stricter view of Judge Huber is supported by the fact that the Permanent Court held Denmark to be entitled to Eastern Greenland only because it found evidence of a display of sovereignty extending over the whole island.[2] Mere contiguity is not, in the long run, a complete substitute for the display of state activity in regard to territory claimed to be occupied.

On either view of the law, however, Argentina's sovereignty in the South Orkneys would be confined to Laurie Island. There is no evidence of any Argentine activity in the South Orkneys before 1939 other than the annual relief of the meteorological staff, although the whaling plainly called for the exercise of sovereignty. Indeed she does not appear even to have voiced a claim to the whole group until she did so in 1925 in the communication to the International Telegraph Bureau which was at once challenged by the United Kingdom. Great Britain, on the other hand, made numerous displays of state activity during this period covering the whole group. The Letters Patent of 1908 purported to settle the administration of the group, and between that date and 1939 there occurred the several and substantial forms of state activity within the South Orkneys group which have been related above.[3] Accordingly there was both an absence of Argentine display of sovereignty in the other islands and the existence of a display of sovereignty by Great Britain. These two facts, on the present authorities, add up to a British title to the remainder of the South Orkneys even if Laurie Island be held to be Argentine.

Graham Land. There remains the question of the extent of the British occupation in Graham Land, the contiguous islands, and the mainland of the Antarctic continent. The first British licences to catch whales in the waters of Graham Land were granted to Norwegian and Chilean companies in 1907. Soon afterwards, as has been stated above, Graham Land and the

[1] *A.J.I.L.* 22 (1928), pp. 743–4.

[2] See above, pp. 343–4.

[3] P. 330.

South Shetlands were treated as a single unit, and the control of whaling from Deception Island extended to about the centre of the west coast of the peninsula, also covering the islands contiguous to the coast to about the same distance. The surveys in later years of the Discovery Committee's ships and of the Royal Geographical Society's expedition appear to have covered much the same area. Assuming that the detailed evidence bears out these statements, Great Britain seems to have been in effective occupation of this much at least of Graham Land before any of her rivals attempted to exercise sovereignty there.

Whether a British title established over the northern half of the peninsula could be held to extend to the remainder of the peninsula and to the mainland sector is a more difficult question. The answer, according to the decision in the *Eastern Greenland* case, depends on whether there has been an actual display of sovereignty by Great Britain over the whole sector. Certainly, the Letters Patent of 1917 purported to legislate for the whole sector. Perhaps the exchange of notes with France in 1938 concerning air navigation in the Antarctic might be regarded as an international dealing with the whole territory, as might also such acts as the authorization in 1934 to Lincoln Ellsworth to fly over the Dependencies. In the nature of things the opportunities for displaying sovereignty in the areas nearer to the South Pole have been few, and geographical unity would, as in the *Eastern Greenland* case, be a factor of some importance. The question, then, is whether the Antarctic sectors would be accepted as a convenient, if arbitrary, form of geographical boundary.[1] But plainly they are not natural boundaries and the British title to the southern part of the sector cannot be spoken of with the same confidence as the title to the areas covered by British regulation of whaling. But, even if the claim to be in occupation of the whole sector were to be rejected, the geographical unity of the peninsula combined with the fact that the Letters Patent of 1908, the Whaling Ordinances, and the whaling licences purported to deal with the whole of Graham Land might, for precisely the same reasons as in the *Eastern Greenland* case, still be held to carry the British occupation over the whole peninsula.

Discovery. None of the Chilean or Argentine activity between 1900 and 1939 appears to call for consideration under the head of discovery. Some British explorations resulted in discoveries which would attract whatever legal rights attach to-day to discovery. But the British claim in the Dependencies is founded, as has been seen, on the higher ground of effective occupation and only if the claim under this head fails need reliance be placed on British discoveries. The present discussion will therefore be confined to an attempt to estimate the legal value of United

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[1] Above, pp. 343–4.

States discoveries and it is repeated that these cannot give any form of title in areas held to be previously within the effective occupation of Great Britain. Many of Byrd's discoveries are outside the Dependencies but those within the Dependencies can only be legally relevant to the extent that the sector is held not to have been already within the sovereignty of the United Kingdom.

Whatever may be the truth about discovery in the sixteenth and seventeenth centuries, the greatest force that can be given to it to-day is an inchoate title—a prior right to proceed to effective occupation. Some refuse even that much force to discovery as, for example, did the United States in the following communication to Norway in 1924 regarding Amundsen's expedition:[1]

> 'To-day, if an explorer is able to ascertain the existence of lands still unknown to civilisation, his act of so-called discovery, coupled with a formal taking of possession, would have no significance, save as he might herald the advent of the settler; and where for climatic or other reasons actual settlement would be an impossibility, as in the case of the Polar Regions, such conduct on his part would afford a frail support for a reasonable claim of sovereignty.'

Norway did not, however, fully agree:[2]

> 'When the statement was made that possession of all the land which might be discovered by Captain Amundsen would be taken in the name of His Majesty, the King of Norway, this did not involve that the Norwegian Government had the intention to invoke a possible discovery of new land as a basis for a claim to sovereignty. It only meant that the Norwegian Government claimed the right to priority in acquiring subsequently the sovereignty by settlement or other procedure sanctioned by international law.'

Norway's view that discovery still gives an inchoate title is endorsed by the majority of writers[3] and it also seems to have been acted on by Judge Huber in the *Island of Palmas* case.[4] As de Visscher points out,[5] the doctrine of inchoate title, though the uncertainty concerning the length of time for which the title lasts is a disadvantage, does, on the whole, make a useful contribution to international order by forbidding unscrupulous attempts to jump the first occupant's claim before he has time to make his occupation effective. Accordingly it is believed that the United States, despite its own expressed views to the contrary, would be held entitled to inchoate titles in regard to any so-called discoveries which it can establish.

On the other hand, it is the first appropriation of the territory by the state, rather than the act of discovery, which sets up the inchoate title. A mere act of discovery, neither previously commissioned nor subsequently ratified by the state, cannot now create a legal right against third states[1]. Where, as in Amundsen's expedition, the state has given the explorer a prior commission, discovery and annexation are virtually simultaneous. But this does not seem to have been done by the United States in the case of Byrd, who took on himself to proclaim annexation on behalf of the United States. The most that can be said of such an uncommissioned act of discovery is that it may entitle the discoverer's state in equity, or perhaps only in comity, to a very brief interval of time in which to decide whether or not to annex the territory. The United States, however, appears neither to have ratified Byrd's annexations nor yet to have abandoned all claim to them. The United States in the same breath denies that mere discovery gives any title and reserves the rights of discovery for its citizens and itself.

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[1] Hackworth, op. cit., vol. i, p. 399.

[2] Ibid., p. 400.

[3] E.g. Hall, op. cit., p. 127; Oppenheim, op. cit., vol. i, p. 510; Fauchille, op. cit., Book I, Part II, p. 720.

[4] *A.J.I.L.* 22 (1928), pp. 867, 884, and 910–11.

[5] Op. cit., pp. 742–3.

The attitude of the United States derives from the opinion held by Secretary of State Hughes in 1924 that effective occupation requires permanent settlement in the territory. The United States seems to regard itself as unable to annex Antarctic territory until it has established there a permanent settlement. The weight attaching to the opinion of Secretary Hughes on any legal matter is fully recognized[2] but, for the reasons previously given at length in the present paper, his opinion on this point is believed to be in flat contradiction to the jurisprudence of international tribunals. The correctness or otherwise of the opinion does not, however, immediately concern us in considering the legal effect of Byrd's discoveries. The point is rather whether it is competent for the United States to reserve, as against third states, a right to ratify Byrd's annexations at some date in the future. On principle, the answer seems to be in the negative because it would be a somewhat doubtful doctrine that a state should be able, by a mere reservation, to exclude other states indefinitely from areas *in which it does not even profess to display sovereignty*. Accordingly, even if British sovereignty in the Dependencies be held not to extend to the area of some of Byrd's discoveries, the United States does not seem yet to have taken adequate legal steps to convert his discoveries into inchoate titles.

Conclusion

The Parliamentary Under-Secretary of State for Foreign Affairs informed the House of Commons on 15 March 1948 that Argentina had set up bases on Gamma Island in the Palmer Archipelago, on Deception Island, and on King George Island, both the latter being in the South Shetlands.[3] He also stated that Chile had set up bases in Greenwich Island in the South Shetlands and on the north-east tip of the Graham Land peninsula. All these bases lie well within the area covered by the exercise of British sovereignty from Deception Island in the first quarter of this century. The standpoint of the United Kingdom is that they constitute encroachments on British territory and British bases have in fact also been set up at key points in Graham Land, the Palmer Archipelago, the South Shetlands, and the South Orkneys since the end of the war. The Chilean President, on the other hand, was reported in *The Times* newspaper of 19 February 1948 to have taken a very different view of the British position. On his return from a visit to the South Shetlands he referred to the United Kingdom as the 'extra-continental Power which, frightened by Europe in convulsions, sought to trample on the principles of the United Nations and the international law of the Americas'. Argentina, of course, also represents the United Kingdom as an interloper.

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[1] See above, pp. 323–4.

[2] On vacating the office of Secretary of State in 1928 he became successively Judge of the Permanent Court and Chief Justice of the United States.

[3] Hansard, vol. 448, cols. 1684–5.

Unless many of the territories of the Dependencies were *res nullius* in 1939 some of the three states disputing the title to the South Orkneys, South Shetlands, and Northern Graham Land are undoubtedly committing breaches of the Charter. The question is, which states. It is not the object of the present paper, as was said at the outset, to give a definitive answer to that question. The legal issues are exceedingly complex and much of the original evidence necessary for reaching final findings of fact is not available. The object has been to make a broad examination of the available facts and of the legal issues to see what prima facie case there is for the attitude adopted by the United Kingdom Government. If, as is believed, the outline of state activity drawn in this paper is broadly correct, there is plainly a substantial prima-facie case both in fact and in law for the United Kingdom's attitude towards the activities of Chile and Argentina in the South Shetlands and North Graham Land areas, though the position *vis-à-vis* the United States in South Graham Land seems less solid.

At any rate, the examination of the facts and the law here undertaken shows that allegations such as that of the Chilean President, even allowing for the poetic exuberance of Spanish American politics, are a serious distortion of the true position. It also provides the reason why neither Argentina nor Chile are prepared to have their legal rights tested by the International Court. The result is a perfect illustration of the weakness of a legal system without compulsory judicial settlement. The United Kingdom cannot obtain an authoritative decision concerning its legal rights and yet is unwilling without such a decision to have recourse to a forcible removal of the Argentine and Chilean parties.[1] Its declared policy is to seek a solution by friendly discussion but meanwhile its competitors continue their efforts to improve their position—efforts which are only kept within bounds by the rigours of the Antarctic climate.

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[1] Hansard, vol. 448, col. 1685.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

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I

THE Universal Declaration of Human Rights, the text of which is reproduced as an annex to the present article[1] and which was proclaimed by the General Assembly of the United Nations on 10 December 1948, has been hailed as an historic event of profound significance and as one of the greatest achievements of the United Nations. It was so described by representatives of various states at the final session of the General Assembly sitting in Paris and during the debates of its Third Committee which preceded it. Thus Mrs. Roosevelt, Chairman of the Commission on Human Rights and the principal representative of the United States on the Third Committee, said: 'This Declaration may well become the international Magna Carta of all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation of the Declaration of the Rights of Man by the French people in 1789, the adoption of the Bill of Rights by the people of the United States, and the adoption of comparable declarations at different times in other countries.'[2] The last part of the comparison was sufficiently elastic to remove from it a charge of obvious exaggeration. The President of the Assembly admitted that the document to be approved was simply a 'declaration of rights' and that 'it does not provide by international convention for States being bound to carry out and give effect to these rights, nor does it provide for enforcement'. But he believed it to be 'a first step in a great evolutionary process'. He said: 'It is the first occasion on which the organized community of nations has made a declaration on human rights and fundamental freedoms, and it has the authority of the body of the United Nations as a whole, and millions of people, men, women, and children all over the world, many miles from Paris and New York, will turn for help, guidance and inspiration to this document.'[3] Previously another Australian delegate described the Declaration as a document of great importance. He said: 'For the first time, the international community of nations considered and declared what, in its opinion, are those human rights and fundamental freedoms which every human being, without exception, is entitled to enjoy. . . . The rights in the Declaration will go forth to the world immeasurably strengthened by the fact that the international community of nations has agreed upon and approved them. . . . The collective authority of the present Declaration of Human Rights gives the Declaration very great weight.'[1]

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[1] See below, p. 378.

[2] As printed in *Department of State Bulletin* (1948), p. 751.

[3] *Verbatim Record of the General Assembly* (subsequently referred to as A/PV.), No. 183, p. 166.

The delegate of Pakistan compared the Declaration with the Convention on Genocide previously adopted by the General Assembly, and submitted that both documents constituted an epoch-making event.[2] The delegate of Denmark affirmed that, as the result of the Declaration, 'living reality is now given to the words of the Charter on human rights and fundamental freedoms'.[3] The delegate of Syria was equally emphatic: 'To-night we can proclaim to the peoples of the world that their goal and their aims have been reached by the United Nations.'[4] The representative of Paraguay, while admitting that the Declaration was not perfect, described it as being 'certainly . . . the most harmonious and comprehensive structure yet erected in this field' and as 'a flaming force which will lead all mankind towards felicity'.[5] While the expansive language of some delegates may be attributed to the native temper of the countries which they represented, no such considerations explain the phraseology used by the Belgian representative. He said:

> 'It seems to us, finally, that very frequent objection has been made to this document by many who pointed out that this was just a statement of platonic wishes, just one more scrap of paper. This is an erroneous statement. In this Declaration, voted by the virtual unanimity of all the Members of the United Nations, there is a moral value and authority which is without precedent in the history of the world, and there is the beginning of a system of international law. The man in the street will claim that he is entitled to the rights proclaimed in this Declaration, and his claims will be supported by the decisions which were taken by the Third Committee and which will subsequently be taken by the General Assembly. There will be, therefore, very great moral prestige and moral authority attaching to this Declaration. Therefore the man in the street claiming certain rights would not simply be an isolated voice crying in the wilderness; it will be a voice upheld by all the peoples of the world represented at this Assembly.'[6]

He did not elaborate the point that although that was a voice upheld by all the peoples of the world (with the exception of the nine states which abstained from voting), it was a voice to which those who proclaimed it were as yet unwilling to give the dignity and the force of an obligation binding upon them in the sphere of law as well as in that of conscience. In the course of the deliberations of the Third Committee the Belgian delegate voiced the view of the vast majority of its members in expressing the hope that the Declaration would be adopted 'both as an homage to France and because it was important for the United Nations to give to the waiting world a tangible proof of its activity and usefulness'.[7]

[1] A/PV.181, p. 6.
[2] A/PV.182, p. 2.
[3] Ibid., p. 21.
[4] A/PV.183, p. 66.
[5] A/PV.182, p. 101.
[6] A/PV.181, p. 47.
[7] A/C.3/SR.91, p. 6.

The representative of Iceland expressed his full conviction that 'the noble ideas of the Declaration of Human Rights will be a light and bring encouragement and joy to many peoples who are not fortunate enough to enjoy these rights at the present time'.[1]

With very few exceptions,[2] the delegations of the states represented at the General Assembly voiced their conviction not only of the importance of the Declaration but also of the desirability of avoiding any delay in its adoption.

In his Report to the General Assembly the Secretary-General emphasized, in similar terms, the significance of the Declaration drafted by the Commission on Human Rights. He said: 'This declaration, the first attempt in history to write a "Bill of Rights" for the whole world, is an important first step in the direction of implementing the general pledges of the Charter concerning human rights.'[3]

II. *The rejection of the Declaration as a legal instrument*

The practical unanimity of the Members of the United Nations in stressing the importance of the Declaration was accompanied by an equally general repudiation of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed. The debates in the General Assembly and in the Third Committee did not reveal any sense of uneasiness on account of the incongruity between the proclamation of the universal character of the human rights forming the subject-matter of the Declaration and the rejection of the legal duty to give effect to them. The delegates gloried in the profound significance of the achievement whereby the nations of the world agreed as to what are the obvious and inalienable rights of man—so obvious and fundamental that they considered the very proposal to describe them as grounded in nature to impart to the Declaration an undesirable element of controversy and confusion[4]—but they declined to acknowledge them as part of the law binding upon their states and governments. They gave occasional expression to the view that any apparent inconsistency between the fact of the general agreement as to what are fundamental human rights and the refusal to recognize them as juridically binding in the sphere of conduct was fully resolved by the acknowledgement of their validity in the realm of conscience and ethics.

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[1] A/PV.181, p. 31.

[2] The delegation of New Zealand was among the few which, at the very outset, expressed a critical view of the Declaration. It suggested that, at least, the Declaration should be adopted at the same time with the Covenant: 'If the Declaration were adopted first, there was less likelihood that the Covenant would be adopted at all; by the time it was ready for adoption, some States, having already accepted the Declaration, might be unwilling to vote for it' (A/C.3/SR.89, p. 4). The New Zealand delegate pointed to the fact that that danger was increased by the prospect of many reading into the Declaration more than was justified, and instanced the view expressed by the French representative before the Economic and Social Council to the effect that the Declaration was an organic act of the United Nations, having all the legal validity of such an act.

[3] *Report to the General Assembly*, 1948.

[4] The proposal to insert the words 'by nature' in Art. 1 was rejected on the suggestion of the Belgian representative on the ground that these words might lead to 'long philosophical arguments' (A/C.3/SR.96, p. 3). The Belgian suggestion was supported by the Chinese representative

The United States, a country whose standing in the world and the perseverance of whose representatives were largely instrumental in bringing about the speedy adoption of the Declaration—a course originally resisted by the United Kingdom and other countries of the British Commonwealth[1]—insisted repeatedly and emphatically on the fact that the Declaration was not a legal document and possessed no legally binding force. Thus the representative of the United States, in the same statement before the General

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whose objection was based on the ground that the phrase 'had a ring of Rousseau and evoked memories of the theory that man was naturally good' (ibid., p. 6). After a prolonged discussion in the Third Committee the view prevailed that the Declaration should not contain a reference to the origin of rights. The Soviet representative emphasized that equality of rights before the law was determined not by the fact of birth but by the social structure of the state (A/C.3/SR.98). Jacque Maritain, the philosopher, was invoked in favour of the same proposition. However, the true question at issue—which seems to have escaped the Committee—is not that of the origin of rights. The true issue is that of their validity—i.e. the question whether the state is the final arbiter of human rights. The Preamble of the Declaration actually invokes the 'equal and inalienable rights of all members of the human family'. A long discussion took place on the Dutch proposal to insert in the Preamble a reference to the divine origin of man. The Soviet representative opposed it and pointed to the Declaration of 1789 which omitted any mention of deity. He was reminded by the Belgian delegate that the American Declaration of Independence used the words 'endowed by their Creator'. But the Belgian representative admitted that the proposal raised a very delicate philosophical problem, and that it would be inconceivable that the Committee should try to solve that question by a vote (A/C.3/SR.165, p. 6).

[1] Thus, in the course of the meeting of the Human Rights Commission in December 1947, the Australian representative, Colonel Hodgson, objected to the proposal to adopt a Declaration otherwise than as forming part of a Bill of Rights. The relevant extract from the Minutes is instructive:

'He was of opinion that the Commission's Terms of Reference did not require it to draft a Declaration of Human Rights. The Draft Declaration presented by the Drafting Committee was, in his opinion, equivalent to a preamble to a Bill of Rights, and as such it should contain a statement of general principles to cover the whole range of human rights and fundamental freedoms. He maintained that the Commission's task was to draft a Bill of Human Rights, not a Declaration which, he felt, entailed no legal obligations and would not in any way affect the lives of men and women unless translated into concrete action. In his opinion, an international bill was a law in both the domestic and international fields, and no executive or legislative organ of a government would be able to override its provisions. It was the Bill of Human Rights which should be submitted to Member Governments, in order that it might be seen whether its contents were in conflict with national legislation and whether new legislation to comply with its provisions would be necessary' (E/CN.4/SR.27, p. 5).

Equally, the British representative, Lord Dukeston, felt that the first task of the Commission was to produce a draft International Bill of Human Rights, which would become a legal document, and which would be implemented (ibid., pp. 7, 8). In February 1948 the spokesman of the British Government reaffirmed that view in the House of Commons. In associating himself with the view that it was undesirable to press for the adoption, in 1948, by the General Assembly of a general document relating to human rights, he said: 'We want definition . . . and we want to be quite firm in ensuring that this is not just another pious resolution': Hansard, *House of Commons*, vol. 447, No. 72, col. 2276 (26 February 1948). And see above, p. 356, n. 2, as to New Zealand.

Assembly in which she extolled the virtues of the Declaration, said: 'In giving our approval to the Declaration to-day, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by a formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.'[1] A general statement, in almost identical terms, had been previously made by the representative of the United States in the Third Committee.[2] In the course of the discussion in that Committee on specific questions the United States consistently affirmed that the Declaration had no legal force.[3] That emphatic repudiation of the idea that the Declaration was a legal instrument creating legal obligations did not signify a sudden change in the attitude of the United States, or of other states. That attitude had been maintained throughout the drafting of the Declaration by the Commission on Human Rights.[4]

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[1] *Bulletin of State Department*, 19 (1948), p. 751.

[2] A/C.3/SR.89, p. 2.

[3] In the course of the discussion of the Preamble the Soviet Union proposed the wording: 'The General Assembly recommends the following "Declaration of Human Rights" to all States Members of the United Nations to be used at their discretion both in adopting appropriate legislative and other measures.' The delegate of the United States urged that the Russian proposal would seriously impair the moral force of the Declaration. She said: 'The fact that the Declaration would not be legally binding upon Governments made it all the more necessary to phrase the Preamble so that it would exercise upon them the greatest possible form of moral "suasion" ' (A/C.3/SR.165, p. 8). When, in the course of the discussion on Art. 1, it was proposed to define the duties of states corresponding to the rights of man, the representative of the United States objected on the ground that the exact definition of the duties of states 'was a legal question, which necessarily placed it outside the scope of the International Declaration of Human Rights' (A/C.3/SR.95, p. 3). When, in connexion with the discussion on Art. 25, the Soviet representative made proposals elaborating the right to a decent standard of living, the United States representative objected on the ground that they went beyond the scope of a declaration and altered its legal form: 'The declaration should be a statement of principles. The State's obligations would be laid down in the Covenant' (A/C.3/SR.143, p. 1). Somehow the view prevailed that mere principles need not be obligatory. In the course of the discussion of the question of the right to a nationality, France proposed an additional paragraph laying down that 'it is the duty of the United Nations to approach States for the purpose of preventing statelessness and, where necessary, to concern itself with the fate of stateless persons'. The proposal was objected to by the United States on the ground that the Declaration should be a statement of the rights of the individual and should include no reference to the duties of governments of the United Nations (A/C.3/SR.123, p. 6).

[4] Thus, in the course of the drafting of the Declaration by the Commission on Human Rights in June 1948, the representative of the United States (Mrs. Roosevelt) said: 'The Declaration should not be in any sense a legislative document. The General Assembly was not a legislative body. . . . It was clear that the Declaration, as envisaged, did not create legal remedies or procedures to ensure respect for the rights and freedoms it proposed to the world; that ideal would have to be achieved by further steps taken in accordance with international and domestic law. The Declaration would have moral, not mandatory, force' (*Summary Record*, E/CN.4/SR.48, p. 7. See also E/CN.4/SR.50, p. 8, for similar observations of the Indian representative). At a later stage the United States representative opposed the Russian proposal to refer expressly in the Declaration to a limitation of working hours. She pointed out that the Declaration had 'no

With isolated exceptions,[1] which will be referred to later, all delegations which had occasion to express themselves on the subject attached importance to stressing the absence of any element of legal obligation in the Declaration about to be proclaimed by the General Assembly. They did so, to a large extent, in order to draw attention to the necessity of the Declaration being followed by a legally binding instrument—a Covenant—provided with means of international supervision and enforcement. Thus the delegate of Australia said: 'I have not forgotten that the Declaration as a statement of principles has moral force only. It does not impose legal obligations. . . . Since it is the convention or covenant of human rights, and not the Declaration, which will impose legal obligations, my delegation feels that the Covenant will be an even more important document than the Declaration.'[2] The Australian representative previously reminded the Assembly that 'on many occasions during the debate in the Third Committee it was stated that the Declaration sets a standard, an objective, but that it is not legally binding'. For that reason he stressed that 'this Declaration must be followed, and that at the earliest moment, by a covenant which will be legally binding upon governments'. Otherwise, he added, 'the peoples of the world who will look to this document for their inspiration will be deceived in their legitimate expectation that it is the intention of the United Nations not only to declare these rights, but to see that they are put in force'.[3]

The British representative at the General Assembly, without wishing 'for a moment to minimise the great moral force of this document', expressed the very strong feeling of his delegation that 'the draft covenant of human rights and its measures of implementation, in which such of these rights as can be legally defined should be ensured by binding obligations between nations, is of even greater importance'.[4] Previously the representative of the United Kingdom stated expressly in the course of the general debate in the Third Committee that, pending the completion of a binding international covenant, the Declaration would have 'great moral authority, through the proclamation of an ideal, even though it could not

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juridical value. . . . Consequently mentioning that right in the Declaration was a meaningless gesture' (E/CN.4/SR.69, p. 10)—a remark which elicited the answer, on the part of the Russian representative, that the same argument could be raised against all other articles of the Declaration. And see E/CN.4/SR.74 for yet another similar observation of the representative of the United States.

[1] See below, pp. 362–4.

[2] A/PV.181, pp. 121, 122.

[3] Ibid., p. 11. In the Third Committee, in connexion with the discussion of the question of asylum, the Australian delegation pointed out that it had previously insisted that formulas implying obligations must be avoided in the text of the Declaration of Human Rights. The Declaration, he said, 'must make no reference to the corresponding obligations of States' (A/C.3/SR.121, p. 16).

[4] A/PV.181, p. 81.

impose specific obligations'.[1] He dissented expressly from the view of the French representative that the Declaration could be considered to have legal authority as an interpretation of the relevant provisions of the Charter. 'No General Assembly resolution', he said, perhaps somewhat sweepingly, 'could establish legal obligations'.[2] In another connexion he insisted that 'although the Declaration was of great significance, it was a statement of principle devoid of any obligatory character'.[3] In connexion with the Resolution, discussed in the Sixth Committee, in the matter of Russian legislation relating to marriages of Russian nationals with foreign subjects, the British representative, unlike other delegates, refrained from asserting that the Russian action was illegal. Using language of studied restraint, he confined himself to submitting that the Russian attitude was contrary to the relevant article of the Declaration—an article against which the Russian representative spoke and voted.[4]

The Indian delegate insisted that as the draft Declaration was not strictly a legal document it was not necessary to examine its wording in detail. He urged the speedy adoption of the draft, for 'although it would not be legally binding, it would have a certain amount of force and might help to dispel pessimism and disillusionment and to relieve the tension of the present world situation'.[5] The representative of Norway agreed that the purpose of the Declaration was to set moral standards rather than to impose legal obligations. He suggested that it would be of practical value 'as it would undoubtedly serve as a basis for the discussion in the United Nations of any question of human rights'[6]—a suggestion the cogency of which is not apparent. The Argentine delegate similarly observed that the Declaration was 'a document which involved moral obligations only and should be followed by one imposing legal obligations'.[7] The Mexican delegate stated that the Declaration did not involve legal obligations. He thought, however, that that fact 'would not diminish the value of the document'.[8]

The French and, following him, the Belgian representatives were alone in claiming some legal force for the Declaration—an assertion the merits of which are discussed later in this article.[9] But even they were unable to adhere to that view with any appearance of consistency. Thus, in connexion

[1] A/C.3/SR.93, p. 2. [2] Ibid. [3] A/C.3/SR.164, p. 8.

[4] Mr. Fitzmaurice (United Kingdom) 'wished to make it clear that he had abstained from discussing the legal aspect of the question. What he said was that even if there was a legal basis for the action of the Soviet authorities, it was none the less an infringement of fundamental human rights' (A/C.6/SR.197, p. 6).

[5] A/C.3/SR.91, p. 4. [6] A/C.3/SR.89, p. 5.

[7] Ibid. At a later meeting he suggested that the Declaration should also take into account existing constitutions of the various countries, so that 'it would have a juridical value as well' (A/C.3/SR.90, p. 7). See also A/C.3/SR.164, pp. 9, 10, for the statements, respectively, of the Greek and Philippine representatives to the effect that the Declaration imposed moral obligations.

[8] A/C.3/SR.90, p. 3. [9] See below, pp. 362–4.

with the suggestion that Article 1 and the Preamble should be combined in one article on the ground that they were of equal weight, Professor Cassin, the principal French representative, reminded the Committee that 'the precedent of the Charter did not apply to the Declaration for the Charter was a legally binding convention, whereas a declaration was a document of a different kind'.[1] When, in the course of the discussion bearing on the right of property, the Soviet representative proposed an amendment stating that everyone has the right to own property in accordance with the law of the country where such property is situated, the Belgian representative objected on the ground that there was no reason for the Declaration, which was only a recommendation and imposed no obligations, to contain a reference to national laws.[2] Similarly, in connexion with the French proposal concerning the right of petition, the Belgian representative expressed doubts as to the legal correctness of including the problem of petitions in a declaration which would not be legally binding upon its signatories.[3]

In the matter of the denial of the legal authority of the Declaration there was no difference between the states which voted in favour of the Declaration and those nine states[4] which abstained from voting—although Soviet Russia and the states associated with her repeatedly proposed the insertion of provisions which would give the Declaration some appearance, but no more, of a binding obligation. They resisted with vigour any proposal to make the Declaration an enforceable international obligation. In the Third Committee the Russian representative emphasized that the creation of international institutions for safeguarding human rights would constitute interference in the internal affairs of states in disregard of national sovereignty:[5] 'They would furthermore tend to transform internal disputes into international disputes, thus endangering world peace.' The Russian, and the associate, representatives rejected any notion of a Declaration likely to interfere with national sovereignty, which they considered the corner-stone of international relations.[6] As the degree of the limitation of national sovereignty also represents in any given case the reality of the legal obligation in the international sphere, it became clear that the Russian representatives used the term 'implementation' in a way differing substantially from accepted usage. They insisted throughout that the Declaration, while scrupulously avoiding any reference to international supervision and enforcement, should contain detailed indications of how human rights, especially in the social and economic spheres, should be implemented by the state.[1] They proposed the insertion of an article laying down that 'the human rights and civic rights and fundamental freedoms enumerated in the present Declaration shall be guaranteed by national laws'. These specific and general proposals for implementation by national authorities were rejected on the unobjectionable ground that there was no place for provisions for enforcement in a document which, by universal consent, was in the nature of a proclamation of principle, binding only in the sphere of conscience. At the same time that particular reason for the rejection of the Russian proposals added emphasis—if any further emphasis was needed—to the general view that the Declaration was not intended in any way to imply a legal obligation.

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[1] A/C.3/SR.97, p. 6. [2] A/C.3/SR.126, p. 4. [3] A/C.3/SR.160, p. 2.

[4] Byelorussia, Czechoslovakia, Honduras, Poland, Saudi Arabia, Ukraine, Soviet Russia, South Africa, Yugoslavia. [5] A/C.3/SR.92, p. 9.

[6] The Russian representative said at the final meeting of the General Assembly on 10 December 1948: 'Yesterday we were told, and hints were made in respect of sovereignty, that it was a reactionary idea. . . . Propaganda against sovereignty is nothing but an ideological proposition for the political capitulation of one country to a more powerful country before the economic power of that other country' (A/PV.183, p. 81). The wording of the Russian amendment to the Preamble of the Declaration was: 'The General Assembly recommend the following "Declaration of Human Rights" to all States Members of the United Nations to be used at their discretion both in adopting appropriate legislative and other measures' (A/C.3/314/Rev.1).

It was only occasionally and by way of rare exception that a delegation showed some lack of appreciation of the fact that the Declaration was not intended to be legally binding. Thus the Canadian delegate in the Third Committee refrained from voting for the Declaration for reasons which could have had validity only if the Declaration were legally binding. He pointed, for instance, to the difficulties created by Article 21(2), which gives the right of equal access to public employment regardless of political creed, and which might therefore be interpreted as an obligation to employ in public service persons aiming at the destruction of those very institutions which it is the object of the Declaration to preserve. Moreover, the Canadian delegation attached importance to the fact that according to the Canadian Constitution various matters covered by the Declaration were within the jurisdiction of the provinces as distinguished from that of Canada.[2] At the General Assembly Canada voted for the Declaration in order not to do anything which might appear to 'discourage the effort to define the rights of mankind'.[3] There is probably no necessity to consider the Canadian hesitation as to Article 21(2), and the Declaration in general, as implying any suggestion that the Declaration is legally binding. Thus, for instance, the representative of the United States, in her general statement at the final meeting of the General Assembly, while expressly repudiating the notion of the Declaration as a legally binding instrument, attached importance to stating that the binding force—the morally binding force—of the Declaration in respect of Article 21(2) was qualified by the terms of Article 29 (2) providing for limitations on the exercise of the rights laid down in the Declaration in the interest of morality, public order, and general welfare. The delegate of Chile, while agreeing that only the Covenant, to be adopted at a future date, would be legally binding, suggested that the violation by any state of the rights enumerated in the Declaration would mean violation of the principles of the United Nations.[1] This was also the view underlying the observations of the delegate of the Lebanon,[2] and of an amendment proposed by Soviet Russia and rejected by the General Assembly.[3] The delegate of India somewhat obscurely described the Declaration as 'a declaration of obligations'. Apparently, however, she considered the document to be only a declaration of moral obligations, for she emphasized that 'the adoption of the Declaration should not . . . divert our attention from the more important document, namely, the Covenant'.[4]

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[1] See, for example, A/PV.182, p. 61; A/PV.183, p. 76.

[2] A/PV.182, pp. 90, 91.

[3] Ibid., p. 91.

There was, therefore, little justification for the reason adduced by the South African delegate before the General Assembly as the explanation for his abstention. That alleged reason was that in the discussion in the Third Committee the Declaration was widely treated as creating 'legal obligations that will have to be observed by those Member States who to-day will subscribe to its terms'.[5] The actual reasons underlying the South African abstention were of a different nature.

The only attempt to claim legal force for the Declaration came from the French and Belgian representatives. As shown above,[6] that attempt was by no means consistent; nevertheless, it merits attention and consideration. In the Third Committee the French delegate, Professor Cassin, maintained that although the Declaration 'would not possess coercive legal power', it could be considered as an authoritative interpretation of the Charter and as the common standard to which the legislation of all the Members of the United Nations shall aspire.[7] The first part of that statement is considered below.[8] The second part was apparently not intended as an assertion that the states voting for the Declaration were legally bound to effect corresponding changes in their national legislation. Professor Cassin then proceeded to point out that although the Declaration had no coercive power, it could not be considered as weakening in any way the pledges made by the signatories of the Charter, a statement which is in itself unobjectionable for the reason that the Declaration, not being a legal instrument, can neither add to nor subtract from existing obligations. Yet the remarks that followed tended to introduce into the argument a distinct element of confusion. In the view of France, he said, 'states are compelled by the Charter to recognize the competence of the main bodies of the United Nations in the matter of human rights . . . the competence of the United Nations in questions of human rights was positive'.[1] That statement he then elaborated in such a way as both to make its meaning uncertain and to infuse legal consequences into the act of adopting the Declaration. He said: 'The provisions of Article 2, paragraph 7, of the Charter relating to the domestic jurisdiction of member States, could not be invoked against such competence when, by the adoption of the Declaration, the question of human rights was a matter no longer of domestic, but of international concern.' Thus, while the distinguished lawyer was saying, in the first part of his statement, that the competence of the United Nations in the matter of human rights was 'positive', he proceeded to suggest that such competence was the result of the adoption of a Declaration which practically all Members of the United Nations considered not to have created any legal obligation at all. The argument is typical of some of the possible effects of the Declaration. While it is clear that the Declaration does not create legal obligations, the argument—for which there is no legal justification—in support of the contrary view is advanced in reliance on assertions which must cast doubt on the legal validity of the existing obligations of the Charter.

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[1] A/C.3/SR.91, p. 7.

[2] Ibid., p. 8.

[3] 'Any violation of these rights [of the Declaration], whether direct or indirect, shall be deemed to violate the present Declaration and to be incompatible with the high principles proclaimed in the United Nations Charter' (A/PV.183, p. 92).

[4] A/PV.182, p. 141.

[5] Ibid., p. 176.

[6] See above, pp. 360–1.

[7] A/C.3/SR.92.

[8] See p. 365.

The observations made by Professor Cassin caused the Belgian representative, Professor Dehousse, to reconsider his previous view of the 'purely optional significance of the Declaration'.[2] He pointed out, in the first instance, that the Declaration, being a recommendation of the General Assembly, which was a juridical organ of the United Nations, had an 'undeniably legal character'. He did not substantiate the view that the Declaration would be in the nature of a recommendation. Neither did he elaborate the significance of the statement that the document would have an 'undeniable legal character'. He then proceeded to inquire whether the Declaration, when accepted, would possess a purely optional significance or whether it would have binding effects. He assumed that certain principles of the Declaration were already part of 'the customary law of nations and were, in consequence, recognized in unwritten international law'. The fact that these principles had now been made part of the Declaration would not deprive these rules of their binding character.

It may not be easy to ascribe any ascertainable meaning, in the accepted terminology and principles of international law, to these submissions of the learned delegate. The student of international law may find it difficult to subscribe to the view that it is a rule of customary international law that, to mention some of the least controversial pronouncements of the Declaration, 'everyone has the right to life, liberty and security of person'

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[1] A/C.3/SR.92.

[2] A/C.3/SR.108, p. 8.

(Art. 3 of the Declaration); or that 'no one shall be held in slavery or servitude' (Art. 4); or that 'no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment' (Art. 5). Prior to the Charter, apart from the precarious doctrine of humanitarian intervention, international law considered these matters to be within the exclusive domestic jurisdiction of the state. With regard to the other rights enumerated in the Declaration, Professor Dehousse admitted that no state would be under an obligation to make corresponding changes in its national legislation. He said: 'No Member State, even if it had voted for the Declaration, would be legally bound to write into its legislation the principles of the Declaration. But it would assume the obligation to take them into consideration. In other words, the recommendation resulting from the work of the Committee would create the beginning of an obligation for the Member States of the United Nations.'[1] These considerations led Professor Dehousse to the conclusion that 'the document would have an incontestable legal value. . . . It would not have any obligatory value strictly so-called; but it would place an obligation on Member States to consider the action which should be taken on that recommendation of the General Assembly.' After having thus affirmed the 'incontestable legal value' of the Declaration, the Belgian delegate admitted 'the subtle character of the question with which he had just dealt' and expressed the wish that the Legal Department of the Secretariat should study it closely.

III. *The 'indirect' legal authority of the Declaration*

The language of the Universal Declaration of Human Rights, the circumstances and the reasons of its adoption,[2] and, above all, the clearly and emphatically expressed intention of the states Members of the United Nations who voted for the Resolution of the General Assembly, show clearly that the Declaration is not by its nature and by the intention of its parties a legal document imposing legal obligations. It is now necessary to consider the view, expressed in various forms, that, somehow, the Declaration may have an indirect legal effect.

(i) In the first instance, it may be said, and has been said,[3] that although the Declaration in itself may not be a legal document involving legal obligations, it is of legal value inasmuch as it contains an authoritative interpretation of the 'human rights and of international freedoms' which do constitute an obligation, however imperfect, binding upon the Members of the United Nations. It is unlikely that any tribunal or other authority administering international law would accept a suggestion of that kind. To maintain that a document contains an authoritative interpretation of a legally binding instrument is to assert that the former document itself is as legally binding and as important as the instrument which it is supposed to interpret. A document described and intended as authoritatively interpreting an already binding instrument may impose upon the parties thereto obligations as far-reaching as the principal convention. It may go beyond that. It may transform what was originally a general and non-committal expression of principle into a tight network of substantial obligations. To say, therefore, that a document is not legally binding and that it embodies, nevertheless, an authoritative interpretation of a legally binding instrument is to make a statement the first part of which contradicts the second. The contradiction can be removed only by dint of the further explanation that 'authoritative' means morally, and not legally, authoritative—an explanation which amounts to an abandonment of the view that the Declaration is legally relevant. But only some such explanation would be consistent with the almost unanimous insistence of the Members of the United Nations that, in adopting the Declaration, they did not intend to assume legal obligations. They did not intend to assume such obligations by the back door of an 'authoritative' interpretation of the Charter in the matter of human rights and fundamental freedoms.

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[1] A/C.3/SR.108.

[2] See below, p. 376.

[3] See above, p. 363.

(ii) Accordingly, there would seem to be no substance in the view that the provisions of the Declaration may somehow be of importance for the interpretation of the Charter as a formulation, in this field, of the 'general principles of law recognized by civilized nations'. The Declaration does not purport to embody what civilized nations generally recognize as law. It embodies, in the words of its Preamble, 'a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.' The Declaration gives expression to what, in the fullness of time, ought to become principles of law generally recognized and acted upon by states Members of the United Nations. In the course of the discussion preceding the adoption of the Declaration, various delegates admitted that, on specific matters, the laws and practices of their countries were not in accordance with the tenets of the Declaration. They repeatedly denied that they were about to accept a legal obligation to adapt their national legislation to the high aspirations of the Declaration. Some of them have, since the adoption of the Declaration, repudiated the suggestion that there exists any such obligation. Thus, in the British House of Commons the Prime Minister, when answering, on 18 January 1949, the question whether the British Government would accede to the Declaration and what changes it proposed to initiate in British domestic and colonial legislation in order to bring such legislation into line with the principles laid down in the Declaration, explained that, unlike the proposed Covenant, which would be a legally binding Convention, the Declaration 'is a statement of fundamental human rights and freedoms that the General Assembly has proclaimed as a common standard of achievement which all should strive to attain', and that there was 'no question of any separate act of accession by states, or of an obligation to give early legislative effect to any provision with which the United Kingdom or Colonial laws may at the moment be at variance'.[1] In reply to a further question as to what action it was proposed to take to give effect to Article 24 of the Declaration which lays down that everyone has the right to equal pay for equal work, the Prime Minister's answer was that 'these declarations contain a great number of rights' and that it is not accepted 'that every state will be able at once to realise these ideals'.[2]

(iii) For the same reason it is doubtful whether the provisions of the Declaration can indirectly benefit the promotion of respect for human rights and fundamental freedoms to the extent of obtaining recognition as part of the 'public policy' of the law of the states concerned and of being enforceable as such by their courts. When, in 1945, in *In re Drummond Wren*[3] a Canadian court declined to enforce a restrictive covenant for the reason that it was discriminatory on account of race, it invoked Article 55 and other relevant provisions of the Charter of the United Nations which, seeing that Canada had become a Member of the United Nations, had, in the view of the court, become part of the 'public policy' of the law of Canada. When, in 1948, in *Hurd* v. *Hodge*, the Supreme Court of the United States, by way of a novel and almost revolutionary interpretation of the Fourteenth Amendment of the Constitution, rendered a similar decision in a similar matter, it stated, without referring expressly to the Charter, that prohibition of discrimination was now—by reason, *inter alia*, of treaties concluded by the United States—part of the public policy of its law.[4] But these considerations can hardly apply to the detailed provisions, as such, of a Declaration which in the view of the states which voted for it implies neither a legal obligation nor a moral duty to adapt their legislation to the principles of the Declaration.

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[1] *Parliamentary Debates*, House of Commons, vol. 460, No. 40, cols. 16 and 17.

[2] Ibid., col. 18. When, in the course of the discussion of the draft of the Declaration before the Human Rights Commission it was proposed to include a provision protecting the individual not only against discrimination but also against 'any incitement to discrimination', the representative of the United Kingdom objected to the proposal on the ground that in the United Kingdom there had never been any need for legislation to compel the authorities to take action against incitement to discrimination, and that if the Declaration were to contain the provision as proposed 'the United Kingdom, feeling morally bound to carry out the provisions of the Declaration would be obliged to pass laws which experience had shown neither necessary nor reasonable' (*Summary Record of the Fifty-Second Meeting of the Commission*, 28 May 1948; E/CN.4/SR.52, p. 14).

[3] (1945) 4 *Ontario Reports*, pp. 778, 781.

[4] See the Opinion of Vinson C.J. in *Hurd* v. *Hodge* (1948), Sup. Ct. 836, 853: 'The power of

(iv) For identical reasons it is idle to attempt to kindle sparks of legal vitality in the Universal Declaration on Human Rights by regarding it as a recommendation of the General Assembly and by inquiring into its legal effects as such. It is not clear whether the Declaration is in the nature of a recommendation—a term which, in turn, bristles with a multiplicity of meanings. As shown by Mr. Sloan in a valuable article published in the present issue of this *Year Book*,[1] some of the 'recommendations' of the General Assembly produce a legal effect, for instance, its recommendations, in the form of 'instructions' or otherwise, addressed to the organs of the United Nations—such as the Economic and Social Council, the Trusteeship Council, or the Secretary-General—which are placed under the authority of the General Assembly. Also, when the General Assembly, in pursuance of the authority conferred upon it by the Charter, creates an organ—such as the International Law Commission—its decision produces definite legal effects. It is not clear that decisions of that nature are 'recommendations'. They are decisions which the General Assembly is entitled and bound to take in the normal course of the administration of the business of the United Nations. The Declaration of Human Rights is cast in the form of a Resolution. But the only operative part of the Resolution is to 'proclaim' the Declaration 'as a common standard of achievement for all peoples and nations'. Significantly it does not contain a recommendation to Members of the United Nations to observe its principles—an omission which may be usefully compared with the Resolution, adopted at the same time, which 'recommends Governments of Member-States to show their adherence to Article 56 of the Charter by using every means within their power solemnly to publicize the text of the Declaration and to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories'. It is probable that some recommendations of the General Assembly, such as those advising the parties to adopt a particular method of pacific settlement, are entitled to respect in the sense not only that a moral duty exists not to disregard them lightly, but also that they may be treated by the Security Council as a factor in deciding, according to Article 39 of the Charter, whether there exists a threat to peace or a breach of the peace—

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federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes and applicable legal precedents.'

[1] Pp. 1 ff.

with all the legal consequences attaching to such a decision. However, unless violence is done not only to the ordinary connotation of words but also to the fundamental structure of the United Nations, which denies to the General Assembly the power of sovereign decision binding the Members of the United Nations, it is difficult to see how a recommendation can be legally binding. Above all, assuming that the Declaration is a recommendation, it is abundantly clear that that particular recommendation was not intended to be legally binding. There was throughout a solemn and emphatic repudiation of the intention to consider it as such. Any hesitating imputation of a 'nascent legal force'[1] to the recommendations of the General Assembly must yield to the clearly manifested contrary determination of the authors of the Declaration.

(v) Finally, it has been maintained that although the Declaration is not binding upon the Members of the United Nations who voted for it, it is, somehow, binding upon the organs of the United Nations charged with the administration of the relevant provisions of the Charter. It is difficult to find any ascertainable meaning in that contention. No organ of the United Nations is entitled to act in a manner amounting to an imposition of obligations upon the Members of the United Nations when no such obligation is grounded either in the Charter or in any binding instrument subsequently accepted by the Members of the United Nations. Thus the Commission on Human Rights, if it were to assume jurisdiction—as, notwithstanding the restraint which it has imposed upon itself, it is bound and entitled to do—in the matter of complaints of violation of human rights, would not be entitled to look to the Declaration as a measure of the obligations of the state concerned. Undoubtedly numerous articles of the Declaration do not differ, in substance, from what would follow from a proper and natural interpretation of the term 'human rights and fundamental freedoms'. To that extent the Declaration, by incorporating the obligations following from the Charter in an instrument which is not binding, may be said, in a sense, to have subtracted from rather than added to its authority.[2] In so far as the Declaration goes beyond that, it provides no authority for an extensive interpretation of the obligations of the Charter.

Not being a legal instrument, the Declaration would appear to be outside international law. Its provisions cannot properly be the subject-matter of legal interpretation. There is little meaning in attempting to elucidate, by reference to accepted canons of construction and to preparatory work, the extent of an obligation which is binding only in the sphere of conscience. If the obligations of the Declaration are only morally binding, every state is entitled to interpret them not in accordance with the common intention —assuming that there be such—of the states which voted for it, but according to its own lights as to the ethical rights and wrongs of any given situation. There may be a tendency—which ought to be resisted—to indulge in a legal interpretation of what is not a legal instrument for the reason that its adoption was preceded by prolonged discussion often indistinguishable from that which precedes the adoption of a statute or a binding international instrument.[1] It may be idle to interpret shades of meaning of an article when the article as a whole is not binding, when its application is subject to 'just requirements of morality, public order and the general welfare in democratic society', and when every state is the exclusive judge of these requirements.

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[1] See Sloan, *supra, in fine.*

[2] 'In a sense'—for as a matter of law the Declaration is a neutral and ineffective instrument.

IV. *The question of the moral force of the Declaration*

The fact that the Universal Declaration of Human Rights is not a legal instrument expressive of legally binding obligations is not in itself a measure of its importance. It is possible that, if divested of any pretence to legal authority, it may yet prove, by dint of a clear realization of that very fact, a significant landmark in the evolution of a vital part of international law. Undoubtedly, extreme care must be taken, in respect of a document of this nature, not to gauge by rigid legalistic standards what was intended by many states to be a historic demonstration of loyalty to the ideals of the Charter. Neither would even a suspicion of sterile scepticism or lack of reverence be appropriate in relation to a document which is the result of much faith, patient labour, and devotion. But the determination to refrain from captious criticism ought not to interfere with the duty resting upon the science of international law to abstain from infusing an artificial legal existence into an act which was never intended to have that character. Any attempt to do so must prove abortive in the long run. If made, with temporary appearance of success, it would tend to weaken efforts in the direction of true progress.

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[1] See, for instance, the elaborate argument of the South African delegate with respect to the comprehensiveness, which he considered to be excessive and unrealistic, of the principle of equality (A/C.3/SR.95, p. 12). He also objected to the insertion of the reference to dignity in Art. 1 since the various articles should be devoted to the statement of fundamental rights 'whereas the dignity of the individual was actually a deeper and broader concept than a right' (A/C.3/SR.96, p. 3). The representative of Iraq objected to the affirmation that men are both free and equal 'for if they were free to develop all their latent possibilities, inequality would result' (ibid., p. 7). The Egyptian delegate expressed the doubts of Moslem countries with regard to Art. 16, which provides for freedom to contract marriages without any limitation based on race, nationality, and religion. He pointed to restrictions in Moslem countries upon the marriage of a Moslem woman with an individual of another creed. 'These limitations', he said, 'are of a religious character and are born from the very spirit of our religion' (A/PV.183, p. 2). He also expressed anxiety, not shared by the representative of Pakistan, as to Art. 18, which provided for the freedom of the individual to change his religion. The Article, he submitted, implied an indirect encouragement to proselytizing by certain missions in the Orient at the expense of the Moslem creed. Detailed, and occasionally heated, discussions took place on the question of the proper age in relation to the right to marry. The representative of Saudi Arabia insisted on the phrasing 'men and women of legal matrimonial age' as distinguished from 'full age'. He said: 'It was not for the Committee to proclaim the superiority of one civilization over all others and to establish uniform standards for all the countries in the world' (A/C.3/SR.125, p. 6). Some delegates objected that the provision of Art. 25, according to which everyone has the right to holidays with pay, was too categorical in relation to the capitalist employer or the housewife.

For these same reasons it is not improper in this *Year Book* to devote a brief discussion to the question of the moral authority of the Declaration. That question, which loomed large in the discussions of the General Assembly and its Third Committee, was answered with an affirmative as emphatic as the repudiation of its authority as a legally binding instrument. Thus the representative of the United States attached great importance to the Declaration for the reason that 'at a time when there are so many issues on which we find it difficult to reach a common basis of agreement, it is a significant fact that forty-eight states have found such a large measure of agreement in the complex field of human rights'.[1] Yet there was profound significance in the fact that these forty-eight states were equally agreed in their determination not to be legally bound by the principles which they declared to be fundamental. The British representative in the Third Committee spoke in similar terms: 'The moral authority of the document that would be adopted by the Assembly would serve as a guide to the Governments in their efforts to guarantee human rights by legislation and through their administrative and legal practice.'[2] Before the General Assembly the British representative, in comparing the Declaration with Magna Carta and similar instruments, said: 'This is, indeed, an historic occasion because, great as are those documents, never before have so many nations joined together to agree upon what they consider to be the basic and fundamental rights and freedoms of the individual.'[3] That combination of assertion of the fundamental character of the rights proclaimed in the Declaration with denial of the legal obligation to respect them raises in itself, in a most acute form, a cardinal issue of international morality. It also raises the question of the moral authority of the Declaration—a question which, in the context of a legal article, may be dealt with very briefly.

The moral authority and influence of an international pronouncement of this nature must be in direct proportion to the degree of sacrifice of the sovereignty of states which it involves. Thus conceived, the fundamental issue in relation to the moral authority of the Declaration can be simply stated: That authority is a function of the degree to which states commit themselves to an irrevocable recognition of these rights by a will and an agency other than and superior to their own. Its moral force cannot rest on the fact of its universality—or practical universality—as soon as it is realized that it has proved acceptable to all for the reason that it imposes obligations upon none. As suggested by the writer of the present article in his Report presented in September 1948 to the Conference of the International Law Association: 'A declaration of this nature might possess a moral value if it sprang from bodies whose business it is to propagate views and to mould opinion. When coming from such a source the word of enlightenment and exhortation may be as potent as a deed. When emanating from Governments it is a substitute for a deed. What the conscience of mankind expects from Governments is not the proclamation of the idea of the rights of man or even the recognition of the rights of man. What the conscience of the world expects from that quarter is the active protection of human rights and the assumption for that purpose of true and enforceable obligations.'

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[1] Loc. cit. above, p. 354.

[2] A/C.3/SR.93.

[3] A/PV.181, p. 516.

Undoubtedly, no Bill of Rights, however rigid may be its legal obligations and however drastic its instrumentalities of enforcement, can prove effective unless, by education and enlightenment, it secures the support of public opinion of the world. But public opinion in support of such aims cannot be created by pronouncements expressing 'a common standard of achievement'. It is inaccurate, in this respect, to compare the Declaration of 1948 with that of 1789 and similar constitutional acts. These may not have been endowed, from the very inception, with all the remedies of judicial review and the formal apparatus of enforcement. But they became, from the outset, part of national law and an instrument of national action. They were not mere philosophical pronouncements. It is because of that—and only because of that—that, in the words of Lord Acton, the single confused page of the Declaration of 1789 outweighed libraries and proved stronger than all the armies of Napoleon. There is nothing in the Declaration adopted by the General Assembly which includes—or implies—any legal limitation upon the freedom of states. It leaves that freedom unimpaired. In that vital respect it marks no advance in the enduring struggle of man against the omnipotence of the state. The moral authority of a pronouncement of this kind cannot be created by affirmations claiming for it such authority.[1] One of the governing principles of the Declaration—a principle which was repeatedly affirmed and which is a juridical heresy—is that it should proclaim rights of individuals while scrupulously refraining from laying down the duties of states. To do otherwise, it was asserted, would constitute the Declaration a legal instrument. But there are, in these matters, no rights of the individual unless as a counterpart and a product of the duties of the state. There are no rights unless accompanied by remedies. That correlation is not only an inescapable principle of juridical logic. Its absence connotes a fundamental and decisive ethical flaw in the structure and conception of the Declaration.

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[1] In the same way—and the observation is pertinent with regard to some formulations of the 'Covenant' and of 'measures of implementation' discussed by the Commission on Human Rights—a document does not become legal and binding merely because its authors describe it as such. Its provisions must, in effect, be such as to bind the signatories. The same applies to 'measures of implementation'. See the writer's observations on this point in his Report to the International Law Association, Brussels Conference, 1948.

Such moral authority as the Declaration may otherwise possess is further impaired by the fact that some of its crucial provisions—while clearly not intended to imply a legal obligation—are couched in language which is calculated to mislead and which is vividly reminiscent of international instruments in which an ingenious and deceptive form of words serves the purpose of concealing the determination of states to retain full freedom of action. Thus few persons—and perhaps few lawyers—reading Article 14 of the Declaration relating to asylum will appreciate the fact that there was no intention to assume even a moral obligation to grant asylum. There was an explicit disclaimer of any such intention. That article provides, in its first paragraph, that 'everyone has the right to seek and enjoy in other countries asylum from persecution'. The Committee rejected the proposal that there shall be a right to be granted asylum. According to the article as adopted there is a right 'to seek' asylum, without any assurance that the seeking will be successful. It is perhaps a matter for regret that in a Declaration purporting to be an instrument of moral authority an ambiguous play of words, in a matter of this description, should have been attempted. Clearly, no declaration would be necessary to give an individual the right to seek asylum without an assurance of receiving it. The right 'to enjoy asylum' was interpreted by the British delegation, which introduced the amendment containing these words, 'as the right of every state to offer refuge and to resist all demands for extradition'.[1] But this, with regard to political offences and persecution generally, is the right which every state indisputably possesses under international law. That right gains no accession of strength by being incorporated in a declaration. Undoubtedly, the grant to individuals of the right of asylum would have meant an innovation in international law (although it would not have been *contrary* to international law, as suggested by the Haitian representative).[2] It would have necessitated a change in the immigration laws of most countries and would have amounted to a limitation upon the absolute right of states to regulate immigration—a consideration by reference to which the proposal was opposed equally by Australia and Soviet Russia as implying an interference with matters exclusively within the domestic jurisdiction of states.[1] It is even possible—though highly improbable—that, as suggested by the British delegate, 'its application might actually lead to persecution by encouraging states to take action against an undesirable minority and then to invite it to make use of the right of asylum'.[2] But it would have been more consistent with the dignity of the Declaration if these considerations had resulted in the elimination of the question of asylum from the Declaration. As it happened, a formula was accepted which is artificial to the point of flippancy. The Committee had previously rejected a French proposal to give the United Nations some standing in the administration of the exclusive right of states to grant asylum.[3] The proposal was accompanied by a note stating, with much relevance, that 'there is no point in proclaiming a right without at the same time stating whose duty it is to give effect to that right'.

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[1] A/C.3/SR.121, p. 5. In the original version of the article the words 'the right to seek' were followed by the words 'and to be granted' asylum.

[2] A/C.3/SR.122, p. 6.

The same purely nominal—and, in effect, deceptive—solution was adopted in the matter of nationality. After stating, in the first part of Article 15, that 'everyone has the right to a nationality', the Declaration proceeds to lay down that 'no one shall be arbitrarily deprived of his nationality'. The natural implication of the principle that everyone is entitled to a nationality would be the prohibition of deprivation—whether arbitrary or otherwise—of nationality in a way resulting in statelessness. None of the states which in the period between the two world wars resorted to deprivation of nationality *en masse* for political or racial reasons would have admitted that such measures were arbitrary. They were, in their view, dictated by the highest necessities of the state. In a pronouncement claiming primarily moral authority there should have been no room for the institution of statelessness, which is a stigma upon international law and a challenge to human dignity in an international legal system in which nationality is the main link between the individual and international law. There was no inclination to soften the impact of that incongruous contradiction by the adoption of the principle that persons who, because of statelessness, do not enjoy the protection of any government, shall be the concern of the United Nations. A French proposal to that effect was rejected both by the Human Rights Commission[4] and by the Committee of the General Assembly.[5]

There is a further element of incongruity in the fact that, on account of the objections raised largely by reference to the exclusive jurisdiction of states, the Declaration, which is a document claiming moral authority, contains no reference to the right of petition—though a special resolution of the General Assembly safeguarded in this respect, somewhat inconclusively, the possibility of giving effect to what it described as an 'essential human right'.[1] The same consideration applies to the omission, after considerable discussion, of any reference to the protection of the rights of minorities to the preservation and development of their separate entity[2] as distinguished from their protection against non-discrimination which is provided for, in general language, in Articles 2 and 7 of the Declaration. In comparison it was probably an accident of final drafting which resulted in the fact, which some delegates found extraordinary, that the fundamental freedoms of thought, of conscience, of religion, and of expression and opinion, should be relegated to the distant Article 19 and placed after the article affirming the right of property.

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[1] A/C.3/SR.121, p. 16 and SR.122, p. 3.

[2] A/C.3/SR.121, p. 5.

[3] The French proposal was to add to the proposal as adopted the words: 'The United Nations, in concert with countries concerned, is required to secure asylum for him.'

[4] E/CN.4/SR.59, p. 11.

[5] See above, p. 358, n. 3.

V. *The Declaration and the Charter*

Any criticism of the Universal Declaration on Human Rights from the point of view of its legal value or its moral force must be tempered by the realization that, in the intention of those who urged—or acquiesced in—its adoption, the Declaration was but a first step. The proclamation of the Declaration was certainly not intended as a complete fulfilment of the task of adoption of an International Bill of Rights conceived as an instrument embodying binding and enforceable obligations. In fact, the proclamation of the Declaration by the General Assembly was accompanied by a resolution stating that as 'the plan of work of the Commission on Human Rights provides for an International Bill of Human Rights, to include a Declaration, a Covenant on Human Rights and measures of implementation', it 'requests the Economic and Social Council to ask the Commission on Human Rights to continue to give priority in its work to the preparation of a draft Covenant on Human Rights and draft measures of implementation'. The question whether that first step was necessary and desirable must remain a matter of controversy. It would be unworthy to attribute it to considerations of internal politics in some states or to a desire, on the part of the Commission on Human Rights, to show some semblance of results after exclusive pre-occupation with the drafting of the Bill of Rights to the detriment of other activities entrusted to it.

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[1] The Resolution requested the Economic and Social Council to ask the Commission on Human Rights to give further examination to the problem of petitions when studying the draft Covenant on Human Rights and measures of implementation 'in order to enable the General Assembly to consider what further action, if any, should be taken at its next regular session' regarding that matter.

[2] The question was referred, in a separate Resolution, to the Economic and Social Council and to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, requiring them to make a thorough study of the problem of minorities 'in order that the United Nations may be able to take effective measures for the protection of racial, national, religious or linguistic minorities'. The Resolution explains that in view of the universal character of the Declaration of Human Rights 'it is difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each State in which it arises'—an explanation which in view of the general character of the Declaration carries little conviction.

It must remain a matter for speculation whether the hopes implied in the Resolution will come to fruition. At the time when this article is being written it is not yet clear whether the Declaration will become a stepping-stone to a true Bill of Rights—that is what is meant by a Covenant and provisions for implementation—or whether it will become a factor in causing the postponement or abandonment of the main instrument for which it was intended to pave the way. For although the Declaration can claim no legal authority and, probably, only inconsiderable moral authority, that circumstance does not deprive it altogether of significance or potential effect. Somewhat paradoxically, the realization of the ineffectiveness of the Declaration *per se* must tend to quicken the pace of less nominal measures for the protection of human rights. It is possible—perhaps probable—that although the Declaration is not in itself an achievement of magnitude, it may, by the realization of that very fact, prove a potent summons to raising and safeguarding the status of man in the international legal system. It is probable that some of the states which urged—or, after initial hesitation, supported—the adoption of the Declaration may have had that possibility in mind. There would, indeed, have been no other justification for adopting the Declaration and for the speed with which it was adopted. But that possibility will not materialize—it will be indefinitely postponed—if we strain both law and fact in order to find in the Declaration of 10 December 1948 a juridical and moral reality.

These considerations suggest that the analysis of the Declaration on the lines of the present article may not be purely negative.[1] Moreover, in addition to the principal, and perhaps not wholly unintentional, aspect of its potential usefulness, the discussions and the study preceding the adoption of the various articles of the Declaration must prove of value for the formulation of the substantive and procedural clauses of a binding and enforceable International Bill of the Rights of Man. There is no warrant for the pessimistic assumption that an international enactment of this kind is a matter of the distant future. Its realization does not depend either upon the unanimity—or even upon a two-thirds majority—of the Members of the United Nations.[1] Moreover, there is no decisive reason why an International Bill of Human Rights between states genuinely resolved to place the rights of man under safeguards independent of their own will and power should not effectively come into being outside the United Nations. This may be the case, for instance, as between members of a regional association of states linked together by a common heritage of which respect for the rule of law and the rights of man is the most precious asset.[2] In the meantime, so long as the conditions prevailing after the Second World War make impossible a universal or general bill of rights endowed with judicial and executive safeguards, the cause of human rights and fundamental freedoms is not altogether without legal protection and safeguards. The Charter of the United Nations imposes upon its Members solemn legal obligations in this field. In that sphere the organs of the United Nations, once they have ceased to regard the drafting of a Bill of Rights to be their exclusive function, have a prominent and decisive part to play. There are indications that, in 1949, after a not altogether fruitless period of trial and error, that view of the legal situation may prevail.[3] The International Bill of Human Rights, when adopted as an effective and enforceable instrument, will complete the historic achievement of the Charter in the sphere of human rights and fundamental freedoms. Pending that consummation, the Charter, when interpreted in good faith and acted upon by the Members of the United Nations and its organs, is a powerful weapon for fulfilling a task which—alongside that of the preservation of the peace—constitutes the crucial purpose of the Charter and of international law. These tasks are complementary and, upon final analysis, identical.

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[1] For a less critical appreciation of the Declaration see Stillschweig in *Friedens-Warte*, 49 (1949), pp. 7–19, and Kunz in *American Journal of International Law*, 43 (1949), pp. 316–23. On the other hand, see Holcombe, *Human Rights in the Modern World* (1948), pp. 130 ff., who considers many of the provisions of the proposed Declaration to be unnecessary and too ambitious, and, to the same effect, Mr. Holman, President of the American Bar Association, in *American Bar Association Journal* of November 1948 and April 1949.

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[1] There is a possibility that the efforts to proceed with a true International Bill of Rights may be impeded by the apprehension that the number of signatories of an effective instrument of that nature would be so small as to invite invidious comparisons with the wide acceptance of the non-committal Declaration. There is no ground for any such apprehension—unless it be the desire to maintain the fictitious authority of the Declaration. It appears that at the time of the adoption of the Declaration there was among the states represented on the Human Rights Commission a substantial number—possibly a majority—of countries willing to lend their support to a binding and enforceable Bill of Rights.

[2] Art. 3 of the Statute of the Council of Europe, set up in May 1949, provides as follows: 'Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I' (which includes discussion by the organs of the Council of questions of common concern and agreements and common action in, *inter alia,* 'the maintenance and further realization of human rights and fundamental freedoms'). Ability and willingness to fulfil the provisions of Art. 3 are described, in Art. 4, as the first condition of membership.

[3] Thus, notwithstanding the Resolution of the General Assembly of 1948 instructing the organs of the United Nations to give priority to the drafting of the so-called Covenant of Human Rights and provisions for its implementation, the Secretary-General, in exercising his undoubted right of initiative, took the important step in May 1949 of proposing to the Commission on Human Rights the reconsideration of its previous decision, which has no foundation in law, that the Commission 'has no power to take any action in regard to any complaints concerning human rights'. See *Report by the Secretary-General on the Present Situation with regard to Communications Concerning Human Rights*; Doc. E/CN.4/165 (2 May 1949).

ANNEX

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

PROCLAIMED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 10 DECEMBER 1948

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations among nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge,

Now therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and the security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration, insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

NOTES

ASYLUM FOR WAR CRIMINALS, QUISLINGS, AND TRAITORS

Recent international practice suggests that war criminals who have fled abroad will not be given permanent asylum. Several multilateral treaties since the Second World War have provided for their extradition.[1] It has been argued that this means that states will not allow persons guilty of morally reprehensible crimes to enjoy the asylum traditionally granted to political offenders.[2] However, it does not appear that offences against the laws of war are, as a rule, political. It is even doubtful whether they are usually inspired by patriotic motives.[3] The extradition of war criminals is therefore analogous to that of common criminals. As in that category, there may be cases which have a political element. It is then for the state of asylum to decide whether extradition would be in accordance with international practice in the matter.

The same is not true of 'quislings and traitors'. No doubt treason against a state in time of war is, from the point of view of that community, the highest possible offence. At the same time it is clear that all acts of treason, including treason committed during war by joining or assisting the enemy, are political crimes.[4] Accordingly, traitors have hitherto benefited from the exemption of political offenders from extradition. This was justified by the American Secretary of State Jefferson as early as 1792 on the ground that 'treason laws do not distinguish between acts against the government and acts against the oppression of the government' and that 'treasons, then, taking the simulated with the real, are sufficiently punished by exile'. It is disquieting to note that that traditional attitude has been departed from since 1945 in two ways: first, with regard to surrender of such individuals by the state of asylum; second, with regard to aid and protection to be afforded them by the International Refugee Organization.[1]

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[1] Moscow Declaration of 30 October 1943, para. 4; London Agreement concerning the prosecution and punishment of major war criminals of the European Axis of 8 August 1945; Treaties of Peace with Italy (Art. 45), Roumania (Art. 6), Bulgaria (Art. 5), Finland (Art. 9), and Hungary (Art. 6) of 10 February 1947. See also Law No. 10 of the Control Council for Germany (*Military Government Gazette*, British Zone of Control, No. 5).

[2] Glaser in *Revue de Droit pénal et de criminologie*, June 1948.

[3] For a detailed discussion see Lauterpacht in this *Year Book*, 21 (1944), pp. 90–1. See also Schlesinger in *Columbia Law Review*, 43 (1943), p. 964, n. 17.

[4] Cf. Lauterpacht in this *Year Book* 21 (1944), p. 91; and *Harvard Research in International Law, Extradition* (1935), p. 112. Contrast a decision of the Cour Militaire of Liége in the case of *Ministère public et État Belge* c. *Lisein* (1946) (*Pasicrisie Belge*, 1946, II, p. 4): 'En temps de guerre, dans un pays occupé par l'ennemi, il n'est pas de crime ou de délit politique possible, ces infractions supposant du jeu normal des institutions politiques. Le préjugé favorable généralement accordé aux délinquants politiques ne peut jouer en faveur de ceux qui, même pour des motifs d'idéologie politique, ont collaboré avec l'ennemi.' Contrast also the decisions of the Cour de Paris (Chambre des mises en accusation) in three recent extradition cases (Case of *Kauffmann*, 1945; *Dalloz hebdomadaire*, 1945, Jurisp., p. 122; Case of *Trivier*, 1947; *Dalloz hebdomadaire*, 1947, Jurisp., p. 468; Case of *Bulterys*, 1947; *Chronique Bimensuelle du Recueil Sirey*, No. 11 (8 June 1947), p. 44). The Court held that: 'Les crimes de trahison, d'intelligences avec l'ennemi, d'atteinte à la sûreté extérieure de l'État ne sont plus considérés en France comme des infractions de caractère politique depuis que le décret-loi du 29 juil. 1939 les a frappés des peines applicables aux crimes et délits de droit commun.' But see the criticism by Prof. Carbonnier of *Kauffmann*'s case, in which it is pointed out that the nature of its punishment does not affect the character of the offence. It should also be noted that 'crimes contre la sûreté extérieure de l'État' in the recent war have been punished by extraordinary tribunals both in Belgium and France (*Pasicrisie Belge*, 1946, Part I, pp. 146, 171, 227; and *Yale Law Journal*, 56 (1946/7), pp. 1210 ff.). It is usually considered one of the tests of a 'common crime' that the offence should be tried by the ordinary criminal courts. For a discussion of some of the recent trials see *Yale Law Journal*, 56 (1946/7), pp. 1210 ff., particularly pp. 1229–30 on the trials of French writers for preaching authoritarian doctrines and expressing anti-Allied sentiments.

Despite some statements to the contrary which have been made in the United Nations,[2] the Moscow Declaration of 30 October 1943 and the Resolution of the General Assembly of the United Nations of 13 February 1946[3] do not provide for the surrender of quislings and traitors. They provide only for the surrender of war criminals. The Assembly Resolution of 13 February 1946[4] provides that quislings and traitors should be surrendered 'in conformity with present and future international arrangements and agreements'. It is meaningless in so far as these do not exist. But the Resolution of the General Assembly of 15 December 1946[5] states that the 'handing over for trial of war criminals, quislings and traitors is . . . an urgent task and obligation'. The Resolution of 31 October 1947,[6] which laid down the procedure for demands of surrender, reaffirmed this. Although the legal effect of Resolutions of the General Assembly is a matter of controversy,[7] they must at least be regarded as indicative of the policy of states whose representatives voted for them. Lord Henderson, Under-Secretary of State for Foreign Affairs, on 23 June 1948 even referred to the Resolution of 13 February 1946 as a 'contractual obligation'.[8] The Treaty of Peace with Italy of 10 February 1947 demands in Article 45 (1) (*b*) the surrender of

> 'Nationals of any Allied or Associated Power accused of having violated their national law by treason or collaboration with the enemy during the war.'

Identical provisions are contained in the Treaties with Bulgaria (Art. 5), Roumania (Art. 6), Hungary (Art. 6), and Finland (Art. 9) of the same date. There have also been some bilateral treaties on the subject. Exchanges of Notes between France and Luxembourg of 19 December 1944[9] and between France and Belgium of 10 January 1947[10] provided for the extradition of persons guilty of treason.[11] These agreements have been applied in several recent cases which have come before the Cour de Paris.[12] In all of them the Court acceded to the request for the extradition of individuals accused of treason.[1] The Bled Agreement of 8 September 1947 between Great Britain and Yugoslavia[2] provided in Article 13 (*a*) that

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[1] U.N.R.R.A. also gave no assistance to displaced persons who 'collaborated with the enemy or committed crimes against the interests or nationals of the United Nations'. See Cmd. 6682 (1945), p. 8; and Cmd. 6815 (1946), p. 17.

[2] For example, in the Resolution of the General Assembly of 15 December 1946 (*Journal of the General Assembly*, First Session, Second Part, p. 880).

[3] Ibid., First Part, p. 661.

[4] Ibid., p. 663.

[5] Ibid., Second Part, p. 880.

[6] *Official Records of the Second Session of the General Assembly*, Resolutions, p. 102.

[7] See the opinion of Prof. Lauterpacht on the legal nature of Resolutions of the Assembly of the League of Nations: 'there seems to be no reason why, as a rule, a Resolution of the Assembly or the Council should not have been binding upon the States assenting to it. A ratified treaty is not the only means of undertaking international obligations. At least in one case—in the Advisory Opinion concerning the *Lithuanian Railway Traffic*—the Permanent Court of International Justice treated a Resolution of the Council assented to by the two parties to the dispute as an engagement binding upon them (Series A/B, No. 42)' (*Recognition in International Law*, p. 417, n. 4). And see above, in this volume, pp. 1–2 and 15–16.

[8] Hansard, *Parliamentary Debates*, House of Lords, vol. 156, col. 1180.

[9] Cited in *Kauffmann*'s case (1945), *Dalloz hebdomadaire*, 1945, p. 122.

[10] Cited by Glaser, op. cit.

[11] The provisions of the French Penal Code referred to in the agreement with Belgium are those dealing with acts against the 'external' safety of the State.

[12] Case of *Trivier*, 29 April 1947 (*Dalloz hebdomadaire*, 1947, Jurisp., p. 468); Case of *Kauffmann*, 16 January 1945 (ibid., 1945, Jurisp., p. 122); Case of *Bulterys*, 22 April 1947 (*Chronique Bimensuelle du Recueil Sirey*, No. 11 (June 1947), p. 44).

> 'The Government of the United Kingdom will surrender all Yugoslav nationals in their power against whom the Government of the Federative People's Republic of Yugoslavia have established a prima facie case of active and wilful collaboration with the Axis powers.'

This agreement was denounced by Yugoslavia in the summer of 1948 on the ground of non-performance by the other party.[3]

The exact meaning of the various obligations mentioned seems to have been imperfectly realized. In United Nations discussion the word 'traitor' has at times been used almost interchangeably with 'war-criminal'.[4] There has thus been some doubt on the nature of '*prima facie* evidence' of guilt. But the two terms cannot be confused. A war criminal is an offender against the international rules of war. Traitors are, in the words of the Assembly Resolution of 31 October 1947, 'nationals of any state accused of having violated their national law by treason or active collaboration with the enemy during war'.[5] In fact most states have recently placed themselves under an obligation to surrender political offenders. It should be added that Great Britain and the United States have been reluctant to undertake such obligations, and have interpreted them restrictively.

Secondly, quislings and traitors, together with war criminals, have been excluded from the purview of the International Refugee Organization, which is for most refugees and displaced persons the only authority capable of resettling them in states of asylum. States cannot be unaware of the fact that the right of asylum is thereby limited. There was lively discussion on the subject in several organs of the United Nations.[6] In fact, when the matter originally came before the General Assembly in February 1946, both the Third Committee and the General Assembly in Plenary Session rejected a Russian proposal that quislings and traitors, like war criminals, should not be entitled to the protection of the United Nations.[7] The proposal was clearly aimed at political opponents. Thus Yugoslavia listed amongst those unfit for protection 'people who in one way or another have taken part in Fascist or military dictatorship régimes, all anti-democratic in character, between January 1929 and March 1941'.[1] But the constitution of the International Refugee Organization contains clauses excluding war criminals, quislings, and traitors from the protection of the organization.[2] It also excludes persons who:

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[1] It did so on the grounds that treason was a crime in both countries concerned; that the agreements with Belgium and Luxembourg had provided for the surrender of traitors on grounds of reciprocity; and that treason was no longer a political offence in France. See, for a criticism of these arguments, Prof. Carbonnier in *Dalloz hebdomadaire*, 1945, Jurisp., pp. 122 ff.

[2] Cmd. 7232, Treaty Series No. 77 (1947).

[3] It should also be mentioned that para. 2 of Art. 15 of the Draft Declaration of Human Rights excludes persons guilty of acts contrary to the purposes and principles of the United Nations from 'the right of asylum'.

[4] See, for example, *Official Records of the General Assembly*, Second Part of First Session, Third Committee, p. 98; ibid., p. 292; *Journal of the General Assembly*, Second Session, No. 23, for a statement of the American delegate at the Sixth Committee that quislings only had to be extradited if guilty of war crimes.

[5] 'Active and wilful collaboration' in the terms of the Bled Agreement is treason. Mr. Mayhew seems to have admitted this in the House of Commons on 3 May 1948. In answer to a question by Mr. Silverman: 'What is the nature of the charges which are brought against these men and what is the kind of *prima facie* evidence he demands? Is it really a question of breaches of the rules of war or rather a question of treason against Yugoslavia itself?' Mr. Mayhew replied: 'I think I can associate myself with the last part of my hon. Friend's Supplementary Question' (Hansard, *Parliamentary Debates*, House of Commons, vol. 450, cols. 883–6).

[6] See *Official Records of the General Assembly*, First Part of First Session, Third Committee; ibid., Second Part of First Session, Plenary Meetings, pp. 1420–54; *Journal of the General Assembly*, First Part of First Session, pp. 535–65; ibid., Second Part of First Session, pp. 769–802; *Official Records of the Economic and Social Council*, First Session, pp. 99–103; ibid., Second Session, Special Supplements 1 and 2; ibid., pp. 91–108 and pp. 348 ff.; ibid., Third Session, pp. 16 ff.

[7] *Official Records of the General Assembly*, First Part of First Session, Third Committee, pp. 27, 55, 63; *Journal of the General Assembly*, First Part of First Session, pp. 535–65.

> '(*a*) Have participated in any organisation having as one of its purposes the overthrow by armed force of the Government of their country of origin, being a Member of the United Nations; or the overthrow by armed force of the Government of any other Member of the United Nations, or have participated in any terrorist organization;
>
> '(*b*) Have become leaders of movements hostile to the Government of their country of origin being a Member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin.'[3] [4]

Two special circumstances have to be taken into account in the case of the International Refugee Organization. First, it has been repeatedly argued that protection of traitors by an international organization obliges states to maintain their own enemies in contributing to the funds of the organization.[5] Second, the International Refugee Organization, as a specialized agency of the United Nations, is bound to act in accordance with the principles and purposes of the United Nations. Thus it can only provide protection for people who, as stated in Annex I, part I, Section C, article 1 (*a*) (i) of the constitution, are afraid of persecution on account of their political opinions, provided these opinions are not in conflict with the principles of the United Nations as laid down in the Preamble of the Charter of the United Nations.[6] Many 'quislings and traitors' are probably excluded by this provision.[7]

It has been argued that Fascist 'traitors' lack the humane outlook which has gained political offenders exceptional treatment, and therefore do not deserve to profit therefrom.[8] However, once compelled to surrender 'quislings and traitors', states cannot draw a logical distinction between these and other political offenders. The test of 'humane outlook' is too subjective to be useful. This was amply demonstrated during the drafting of the constitution of the International Refugee Organization. Five amendments proposed the exclusion from protection of all political dissidents.[9] In his speech supporting one of these the Russian representative declared that asylum to 'enemies of United Nation governments' was impossible.[1] These arguments were not accepted.[2] But the problem of finding an agreed distinction between different categories of political offenders remains. Several tests have been suggested in United Nations discussions on the matter. Thus Yugoslavia proposed that asylum might be granted to persons merely holding different opinions from their governments and in danger of persecution on that ground, but that protection should be refused to persons guilty of hostile acts, including active propaganda.[3] The representative of the United States proposed that only persons who actively worked against their country during the war should be classified as 'traitors'.[4] There is no standard by which we can declare one or other of these tests to be satisfactory. It is, in particular, difficult to refute the argument put forward by Poland: 'Quislings and traitors . . . are those who are classified as such by national legislation.'[5] There are now frequent complaints that 'war-criminals, quislings and traitors are not treated as such but as political emigrés'.[6] For the countries of origin and the countries of refuge have interpreted these terms differently. The purpose of agreements not to extend asylum and protection to traitors was to meet the wishes of those countries of origin who had suffered more severely in the war than the countries of refuge. It is doubtful, in the light of principle and of the subsequent failure to agree upon the interpretation of the terms in question, whether that object rightly warranted the abandonment of an important aspect of political asylum.

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[1] *Official Records of the General Assembly*, First Part of First Session, Third Committee, p. 47.

[2] Annex I, part II, art. 1 of the final constitution. Such a clause was already included in the first draft by the Special Committee on Refugees and Displaced Persons: *Official Records of the Economic and Social Council*, Second Session, Special Supplement No. 1.

[3] Annex I, part II, art. 6. A suggestion that all members of movements mentioned under (*b*) should be excluded was rejected.

[4] The eligibility of an individual for protection is decided by a semi-judicial body of five members (*Monthly Digest of the P.C.I.R.O.*, No. 3 (November 1947), p. 23).

[5] *Official Records of the General Assembly*, First Part of First Session, Third Committee, p. 48; *Journal of the General Assembly*, First Part of First Session, p. 544.

[6] Cf. art. 14, para. 2 of the Declaration of Human Rights, approved by the General Assembly on 11 December 1948: 'This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations' (*United Nations Bulletin*, vol. vi, No. 1).

[7] Cf. the view of the delegate of Pakistan in the Third Committee of the General Assembly on art. 14 (then art. 12) of the Declaration of Human Rights: 'By denying the right of asylum to all those guilty of acts contrary to the purposes and principles of the United Nations, they ipso facto denied asylum to the Nazis and Fascists whom Mr. Pavlov wished to except . . .' (Doc. A/C.3/SR. 121, p. 15, 3 November 1948).

[8] Glaser in *Revue de Droit pénal et de criminologie*, June 1948.

[9] *Official Records of the General Assembly*, Second Part of the First Session, Third Committee, p. 334. See also ibid., p. 103.

FELICE MORGENSTERN

THE TERMINATION OF THE EGYPTIAN MIXED COURTS

ON 14 October 1949 the Egyptian Mixed Courts will come to an end in accordance with the Montreux Convention of 8 May 1937. At the same time the Consular Courts still maintained by some foreign governments will also cease to function, and the last vestiges of the capitulatory régime will disappear.

In the 1937 volume (pp. 79 ff.) of this *Year Book* there is an authoritative account of the Anglo-Egyptian Treaty of Alliance of 1936 and of the plan embodied in it for the abolition of the capitulations, while in the 1938 volume (pp. 161 ff.) there is a scholarly account of the Montreux Conference of April/May 1937, and of the Convention and other agreements reached at it. So long and carefully had the ground been prepared and so able were the delegations to the Conference that the extremely complicated and technical legal problems involved were solved in less than a month and the smooth working of the modified system of the Mixed Courts during the transition period of twelve years, which is now expiring, is testimony to the quality of the work done at Montreux. A special burden fell on the Egyptian and British delegations to whom a large share of the credit is due.

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[1] *Official Records of the General Assembly*, Second Part of First Session, Third Committee, p. 175.

[2] Ibid., pp. 91, 156.

[3] Ibid., p. 263.

[4] *Journal of the General Assembly*, First Part of the First Session, p. 547. Compare with this test Art. 22, para. 3 of the Mexican constitution of 1917: 'The penalty of death for political crimes is prohibited; for other types of offences it may be imposed only for high treason committed during a foreign war. . . .'

[5] *Official Records of the Economic and Social Council*, First Year, Second Session, Special Supplement No. 1, p. 149.

[6] Ibid., pp. 45–53; *Journal of the General Assembly*, Second Part of the First Session, p. 777; ibid., Second Session, No. 41, pp. 5–7; ibid., Third Session, No. 26, p. 4; *United Nations Weekly Bulletin*, vol. 5, No. 9, p. 861.

The arrangements made at Montreux were so comprehensive and their operation so nearly automatic that there is little of general legal interest to add to the accounts that have already appeared in this *Year Book*. What follows describes briefly what has happened since Montreux, and the problems that remain for the governments interested, and more particularly the Egyptian Government.

Perhaps the most significant consequence of the termination of the Mixed Courts will be the disappearance from the judicial bench in Egypt of foreign judges. In the Mixed Court of Appeal the principle of a majority of foreign judges, of whom there are twelve, to eight Egyptians, has been maintained. Progressively, however, since 1937, the number of Egyptian judges in the Mixed Courts of First Instance has been increased until now the former ratio of two-thirds foreign to one-third Egyptian judges has been reversed, so that to-day there are forty Egyptian to twenty-one foreign judges. This wise provision of the Montreux arrangements for increasing the number of experienced Egyptian judges against the day when the foreign judges would leave will substantially reduce the impact of the forthcoming change, if the Egyptian Government succeeds in inducing these Egyptian judges to serve in the National Courts.

It goes without saying, and the Egyptian Government has adopted the principle, that, as far as possible, the services of the Egyptian judges in the Mixed Courts should be made available to the National Courts, and this not only for their help in the liquidation of pending litigation, but in new litigation in which the foreign element is prominent.

The difficulty in the matter of securing the services of these judges lies in the fact that, in some ways, the Egyptian judges in the Mixed Courts have enjoyed more favourable conditions of service and rank than their colleagues of the National Courts. The result is a jealous scrutiny on the part of the latter of any proposal to accord to the judges of the Mixed Courts who are transferred to the National Courts any advantage in conditions of service. A solution to this problem has not yet been found. It is still impossible to predict how many of the Mixed Court judges will accept a transfer. As to the Court of Appeals, it seems probable that the number will be small. As to the lower courts, the number will depend on the nature of the conditions offered. For instance, judges who have spent years in judicial work in Cairo or Alexandria are not likely to be easily tempted to carry on under conditions which might involve their being sent to the provinces. It is a question of seeking the general good even at some sacrifice of prestige or protocol. It is to be hoped that a solution will be worked out that will enable Egypt, and foreigners there, to enjoy the full and long-continued benefit of the services of the many able and well-trained Egyptian judges who have held an honoured place beside their foreign colleagues in the Mixed Courts.

On 14 October 1949 all cases pending before the Mixed Courts will be remitted to the National (Civil) Courts to be continued there. That the task of these courts in dealing with these cases, apart from new litigation, will be of considerable magnitude is shown by the statistics on p. 388 of cases pending in the Mixed Courts on 30 June 1948. It is not only the number of pending cases that is formidable, but civil cases in the Mixed Courts have, from the beginning, been of dominating importance because of the size of foreign interests in Egyptian industry and commerce. Other governments will watch closely how the legitimate interests of their nationals in the effective administration of justice are served by the National Courts.

The task of the National Courts will be the heavier because legal and practical difficulties stand in the way of continuing in the employment of the National Courts at least a quarter of the present administrative personnel of the Mixed Courts. These now number about 575, of whom 113 are Europeans, while a considerable number of the rest are non-Muslim Egyptians whose knowledge of Arabic is limited.

By Egyptian law the foreign personnel cannot continue in the government service after the statutory authority for the Mixed Courts terminates. The main practical difficulty is one of language. The Mixed Courts have, under their Charter, four official languages (Arabic, French, Italian, and English, the last having been added by a Decree of 17 April 1905), but in practice French has become *the* language of the courts, being the language of the Codes on which the jurisprudence of the courts has been based. Few, if any, of the existing foreign personnel and of the non-Muslim Egyptian personnel know Arabic well enough to serve under a system where Arabic alone is to be used. It follows, therefore, that the National Courts will assume the Mixed Court jurisdiction under the handicap of a shortage of experienced staff which cannot be readily made good. That the foreign personnel of the Mixed Courts would have to leave at the end of the transition period was recognized at Montreux where it was arranged that they should be generously treated by the Egyptian Government on their premature retirement, and legislation to this end is now in draft. To facilitate the transfer of jurisdiction it was also suggested that those who must retire in 1949 be offered inducements to retire earlier, so as to give place to Egyptians competent in Arabic who might thus obtain a year's experience of the kinds of case coming before the Mixed Courts before the transfer takes place; but nothing so far has come of this, and time is passing. Meanwhile, by a law of 27 May 1948, financial inducement in the shape of a partial rebate of court fees has been offered to litigants in the Mixed Courts to submit with their pleadings translations into Arabic. It is understood that little advantage has yet been taken of this inducement.

Pending Cases

	Civil	*Criminal*	*Total*
Court of Appeals	834	..	834
Three trial courts:			
Alexandria	1,378	86	1,464
Cairo	3,274	126	3,400
Mansourah	620	12	981
Port-Fouad	334	15	
		Total .	6,679

Under their *juridiction gracieuse* the Mixed Courts established two non-judicial services of great importance to Egypt, the *Notariat* and the Deeds Registry, the latter bringing to the Government a very large annual revenue. Well in advance of the termination of the Mixed Courts these services have been transferred to purely Egyptian hands, the Deeds Registry at the beginning of 1947, and the *Notariat* at the beginning of 1948. These services were not the subject of treaty obligations.

The question of the law which will be applied in the National Courts presents, in principle, no problem which will trouble foreigners. The National Courts were founded in 1882, seven years after the creation of the Mixed Courts, and the Codes then adopted were substantially the same as those already in effect in the earlier institution. Since then various changes have been made, especially in the matter of procedure, but the two systems are to-day closely similar. This similarity has been emphasized by the fact that since the Montreux Convention, Egypt has been free to modify at will both the Mixed and the National Codes, as well as to adopt laws equally applicable to both systems. This latter faculty has been freely exercised, and has worked in the direction of uniformity. In particular, the Egyptian Government has for several years been elaborating new civil and commercial Codes to be of general application and a new Civil Code has recently been passed by Parliament and is shortly to be promulgated.

In the field of criminal law no modifications in the present system are immediately projected. The same Penal Code is applied by both the Mixed and National Courts. The criminal jurisdiction of the Mixed Courts represents but a small fraction of its total judicial effort, and as far as crimes and felonies are concerned, the cases are relatively few. The system of criminal procedure applied in the National Courts, while in many ways more expeditious than the Mixed Court system, presents substantial guarantees of justice. One question which escaped treatment at Montreux was that of the prison system in Egypt. The revision of the system has been under study for the last ten years and it is thought that draft legislation will soon be submitted to Parliament.

The abolition of the capitulations had been discussed for many years before the Montreux Conference of 1937 and it had become apparent that the field in which the Capitulatory Powers were most reluctant to transfer jurisdiction even to the Mixed Courts was that of personal status. Thus it was that at Montreux, even though criminal jurisdiction over foreigners was entrusted to the Mixed Courts, the Capitulatory Powers reserved the right to maintain their Consular Courts to determine matters of personal status affecting their nationals until the end of the transition period. The Powers exercised this right and most of them still administer justice to their nationals in this field through their Consular Courts. Nevertheless there were some Powers which did not have the right to maintain Consular Courts in Egypt although their nationals came within the jurisdiction of the Mixed Courts, and during the late war the French consular jurisdiction was suspended during the Vichy régime as was the Italian from the time Italy entered the war. As a result there has been a substantial body of foreigners in Egypt whose personal status questions have been within the jurisdiction of the Mixed Courts, and there is nothing to suggest that these courts have not adequately performed their duty of applying to these questions the appropriate foreign law. On 14 October 1949 the Consular Courts will all come to an end like the Mixed Courts, but in view of the experience which the Mixed Courts have had in personal status matters this does not create a problem for the Egyptian judiciary different in kind from the problems involved in the termination of the Mixed Courts themselves. The only qualification of this statement is that the Mixed Courts have seldom, if at all, been called upon to deal with personal status matters involving the application of the Anglo-American system of law. Their experience has been almost entirely of problems arising out of continental systems of law with which they are most familiar. Some difficulty may, therefore, be expected to be experienced by the Egyptian National Courts even when they are fortified with former Mixed Court judges in applying the rules in matters of personal status peculiar to the Anglo-American system.

That the national law of a foreigner should be applied in this field is an established principle of Egyptian law, which in their Declaration of 8 May 1937 the Egyptian Government have stated their intention to maintain in the future. The new Civil Code shortly to be promulgated provides for this.

Whether the Egyptian Government will choose for a time to take advantage of the services in an advisory capacity of some of those foreign legal experts who have been applying these rules of foreign law in Egypt remains to be seen. That the Egyptian Government desires to discharge in an unexceptionable way this additional responsibility goes without saying, but the task is undoubtedly a difficult one. In some intricate cases assistance will no doubt be sought from the competent authorities of the countries whose nationals' personal status is in question. Meanwhile, as the system of procedure in this field of law is closely bound up with the rules of substantive law, the task of establishing a procedure sufficiently flexible to cover such widely different national systems as the French and the Anglo-American calls for very careful study and skilful drafting. This task is now in hand.

It remains to point out that even after the abolition of the capitulations in 1937 foreigners have continued to enjoy, by reason of the continuance of the Mixed Courts and otherwise under the Montreux arrangements, protection which in the normal way would be secured by, for example, establishment treaties. Thus during the transition period they have enjoyed protection from arbitrary arrest and detention, from arbitrary expulsion, and from extradition without a judicial inquiry. They have enjoyed the right not to be discriminated against by Egyptian legislation both fiscal and general. They have enjoyed the right to the assistance of their consuls and of lawyers when in need, and indeed it is at the moment only under the Montreux Convention that most foreign countries are entitled to maintain consular representatives in Egypt. True there is no time limit explicitly fixed by foreign consuls for their functions in Egypt, but it was certainly contemplated that consular conventions would be concluded between Egypt and other countries in the near future. This was impeded by the war. The same is true in the case of establishment treaties. In its Declaration of 8 May 1937 the Egyptian Government expressed its readiness to conclude such treaties, but so far none has been signed with any of the Montreux Powers. An obvious matter for regulation by such treaties is the terms on which educational, medical, and charitable institutions may carry on their functions. For the time being these institutions are protected in Egypt by the notes exchanged at Montreux.

The nationalistic trend of Egyptian legislation in recent years, the increasing restrictions on the entry and residence of foreigners, new Company legislation and the restriction (legally or illegally) of opportunities for foreigners, however long established in Egypt, to obtain a livelihood, have all created anxiety in the large foreign communities in Egypt and uncertainty in the many countries anxious to continue to do business with Egypt. The approaching termination of the Mixed Courts is the occasion rather than the cause of all these matters coming to a head at the present time. But for the war many would have been arranged long since. As it is, Egypt and the Montreux Powers are now faced with the formidable task of negotiating in the near future treaties of establishment, commerce, and navigation, and consular conventions so as to put their relations and those of their citizens on a normal basis.

A. McDougall

THE BRITISH FOREIGN MARRIAGE ACT, 1947, AND THE FOREIGN MARRIAGE ORDER IN COUNCIL, 1947

The principal, although not the only, purpose of the Foreign Marriage Act, 1947, is to remove the doubts and difficulties created by Section 22 of the Foreign Marriage Act, 1892, relating to 'marriage within the lines'.

Section 22 is as follows:

> 'It is hereby declared that all marriages solemnised *within the British lines* by any chaplain or officer or other person officiating under the orders of the commanding officer of a *British army serving abroad*, shall be as valid in law as if the same had been solemnised within the United Kingdom with a due observance of all forms required by law.'

This section, which was the statutory recognition of a rule of common law restated by Lord Stowell in *Ruding* v. *Smith*,[1] has given rise to numerous difficulties with regard to its interpretation. In the first place, there has been considerable doubt whether marriages solemnized on land by naval or air force chaplains or other persons officiating under the orders of an officer commanding the naval or air forces of His Majesty were, in view of the expression 'a British *army* serving abroad', to be regarded as valid. In 1892 the aeroplane was still unheard of, and the Royal Air Force as a separate part of His Majesty's forces did not come into being until the entry into force of the Air Force (Constitution) Act, 1917. Again, it was not contemplated in 1892 that, in time of war, naval forces would be stationed on land in territory outside Her Majesty's dominions for any length of time. Section 12 of the Act of 1892, however, provided that a marriage under the Act might be solemnized 'on board one of Her Majesty's ships on a foreign station' and directed that regulations should be made for this purpose. No such regulations were, in fact, ever made, although more detailed provisions regarding such marriages were contained in the Foreign Marriage Order in Council, 1913.

The creation of the Royal Air Force and the altered conditions of warfare in the twentieth century have, in fact, meant that a number of marriages have been solemnized abroad by naval and air force chaplains or other persons authorized by naval and air force commanders, and the validity of such marriages has been open to some doubt. Section 1 (1) of the Foreign Marriage Act, 1947, therefore provides that Section 22 of the Act of 1892 shall, as respects marriages solemnized before the commencement of the Act, be deemed always to have had effect as if the reference to a British army serving abroad were construed as referring to any part of the naval, military, or air forces of His Majesty so serving.

A further difficulty in regard to the interpretation of Section 22 of the Act of 1892 was the reference to 'the British lines'. As Professor Cheshire pointed out,[2] 'The troublesome question is the exact meaning of the expression "British lines". What area of an occupied country does it comprise?' In 1837, when the *Waldegrave Peerage* case[3] was decided, the view seems to have been that the expression 'within the lines' meant the immediate area in which troops were quartered. There was, however, little doubt that by 1947 the phrase had acquired a more extensive meaning, and Professor Cheshire's opinion[4] was: 'If effective control is the governing factor—if the "lines" include the whole of the area where the military writ runs—then a marriage celebrated in a part of the country remote from that in which the troops are stationed may be a marriage within the meaning of the Act of 1892.'

Section 1 (1) of the Act of 1947 clears up this difficulty by providing that, as respects marriages solemnized before the commencement of the Act, the reference to 'the British lines' shall be construed as referring to any place at which any part of the said forces serving abroad was stationed. Whilst Section 1 of the 1947 Act removes any doubts as to the validity of certain marriages within the lines celebrated before the coming into force of the Act, Section 2 provides for the future by re-enacting Section 22 of the 1892 Act. Sub-section (1) of Section 22 as so re-enacted provides that:

> 'A marriage solemnized in any foreign territory by a chaplain serving with any part of the naval, military or air forces of His Majesty serving in that territory or by a person authorized either generally or in respect of the particular marriage by the commanding officer of any part of those forces serving in that territory shall, subject as hereafter

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[1] 2 Hag. Con. Rep. 371.

[2] *Private International Law* (3rd ed.), p. 423.

[3] (1837) 4 Cl. & F. 649.

[4] Op. cit., p. 424.

provided, be as valid in law as if the marriage had been solemnized in the United Kingdom with a due observance of all forms required by law:

'Provided that this subsection shall only apply if—

'(*a*) one at least of the parties to the marriage is a member of the said forces serving in that territory or a person employed in that territory in such other capacity as may be prescribed by Order in Council; and

'(*b*) such other conditions as may be so prescribed are complied with.'

Yet another doubt which had arisen regarding the interpretation of Section 22 of the 1892 Act was whether the section applied where neither of the parties to the marriage were members of, or connected with, the British Army. The Law Officers of the Crown advised in 1936 that Section 22 was not confined to cases where one of the parties was a member of the Army, although strong arguments had been put forward against such a liberal construction of the section.

The re-enacted Section 22, when read with the provisions of Article 2 (2) of the Foreign Marriage Order in Council, 1947, makes it clear that for the future the section will apply only where one of the parties to the marriage is a member of His Majesty's forces or is one of the ancillary personnel connected with such forces. Article 2 (2) of the Order in Council defines the ancillary personnel who may be so married as women employed in various capacities with the Navy, Army, and Royal Air Force and men and women employed with the British Control Service in Germany or with the British Element of the Allied Commission for Austria. It should be noted that the original Section 22 never gave to any person a *right* to a marriage under Section 22 in the sense that any party could declare that he or she fulfilled the conditions of the section, and therefore had a right to be married under it, but only validated marriages celebrated 'within the lines' without conferring any right to be so married. The re-enacted Section 22 does not purport to confer any such right, but merely declares that a marriage under its provisions shall be as valid in law as if the marriage had been solemnized in the United Kingdom with a due observance of all forms required by law.

The other conditions for a marriage under the re-enacted Section 22 which have been prescribed by the Foreign Marriage Order in Council, 1947, are certain requirements as to the giving of notice of the marriage to the officer commanding in the territory in which either party to the marriage is serving or is employed and a provision that the marriage shall be solemnized in the presence of no less than two witnesses in addition to the parties and the person solemnizing the marriage. These provisions are entirely new, since the Act of 1892 prescribed no formalities in connexion with a marriage 'within the lines'.

The expression 'within the lines' is replaced in the re-enacted Section 22 by the expression 'foreign territory', which is defined in Sub-section (2) of the re-enacted Section 22 as territory other than

(*a*) any part of His Majesty's dominions;

(*b*) any British protectorate;

(*c*) any other country or territory under His Majesty's protection or suzerainty or in which His Majesty has for the time being jurisdiction.

It is, however, also provided that His Majesty may by Order in Council direct that any territory referred to in (*b*) or (*c*) or any part of His Majesty's dominions which has been occupied by a state at war with His Majesty and in which the facilities for marriage in accordance with the local law have not been adequately restored may, whilst the Order remains in force, be treated as 'foreign territory'. Sub-section (3) of the re-enacted Section 22 also provides that the expression 'foreign territory' shall include 'ships which are for the time being in the waters of any foreign territory'. Section 12 of the 1892 Act is therefore repealed by Section 4 of the 1947 Act.

The re-enacted Section 22 does not specifically provide that the section applies not only to marriages celebrated under its provisions when His Majesty's forces are on active service, but also, for example, where such forces are in occupation of a foreign country after the successful conclusion of hostilities—a matter which was raised as early as 1819 in the case of *Burn* v. *Farrar*[1]—but the provision made by Order in Council that members of the Control Service in Germany and the Allied Commission in Austria are persons who may be married under the re-enacted Section 22 makes it clear that the section is intended to apply in other conditions as well as those of 'active service'. A further provision of the re-enacted Section 22 is that the registration of marriages solemnized under the section shall be provided for by Order in Council. This has been done by Article 3 of the Foreign Marriage Order in Council, 1947, which provides for the transmission to the Registrar-General through such authority as may be directed by the Admiralty, the War Office, or the Air Ministry, respectively, of certificates of marriages solemnized under the re-enacted Section 22, and for the registration by the Registrar-General of such marriages.

Section 3 of the Foreign Marriage Act, 1947, provides for recognition in the United Kingdom by Order in Council of provisions in the law of the Dominions corresponding to Section 22 of the Foreign Marriage Act. So far, the only provisions so recognized (by Art. 4 of the Foreign Marriage Order in Council, 1947) is Section 7 (1) of the New Zealand Marriage Amendment Act, 1946. Section 5 of the Foreign Marriage Act, 1947, lays down that in certain cases the consents required, in respect of marriage abroad, under Section 4 (1) of the Foreign Marriage Act, 1892, when one of the parties is a minor, may be dispensed with. Where the consent of any person from whom it is required cannot be obtained by reason of absence, inaccessibility, or disability, the Secretary of State or, in such cases as may be prescribed, the Registrar-General, may dispense with the necessity of obtaining this consent. Article 5 of the Foreign Marriage Order in Council, 1947, prescribes that the dispensation may be given by the Registrar-General in respect of a person who is residing in England, Scotland, or Northern Ireland and on whose behalf due notice of the marriage has been given in the country in which he resides.

Section 6 of the Foreign Marriage Act, 1947, is an addition to Section 18 of the Foreign Marriage Act, 1892, which enables a British consul, or a person acting as such, to register marriages solemnized in accordance with the local law in a foreign country between parties of whom one at least is a British subject, if satisfied by personal attendance that the marriage has been duly solemnized. It is now provided by Section 6 of the 1947 Act, and by Article 6 of the Foreign Marriage Order in Council, 1947, which amplifies Section 6 of the Act, that in the case of marriages celebrated in accordance with the local law, but otherwise than in the presence of a British consul, certificates of such marriages may be transmitted to, and received by, the Registrar-General, who is enabled to issue certified copies of such certificates which can be received in evidence.

J. A. C. GUTTERIDGE

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[1] 2 Hag. Con. Rep. 309.

THE *LOCUS DELICTI* IN ENGLISH PRIVATE INTERNATIONAL LAW

THE question: Where is a tort committed? is one which has been considered only in very recent years both in the English cases and in text-books on private international law. The first case in which the problem was directly considered by an English court was *George Monro Ltd.* v. *American Cyanamid and Chemical Corporation* in 1944.[1] Previously, the problem had been raised in *Kroch* v. *Rossell et Cie*[2] in 1937, but the Court of Appeal reached its decision without specifically deciding the point. Before the third edition of Cheshire's *Private International Law* (1947), the question was discussed in only one of the English books. This was Wolff's *Private International Law*, which, although published in 1945, was in the press before the decision in *Monro*'s case. The point was not mentioned in the fifth edition of Dicey, and in Cheshire's second edition there was only an incidental reference to the place in which a libel was committed, but not in the chapter on torts.[3] Cheshire and Dicey, in dealing with torts, were concerned exclusively with the rules which determine whether and in what circumstances a foreign tort is actionable in England. On this subject, the rules are tolerably clear: the act or default on which the claim in tort is based must be (1) actionable as a tort by English law; that is to say, it must be such that, if done in England, it would be a tort, (2) not justifiable according to the *lex loci delicti commissi*. But it was not until Wolff raised the point that any consideration was given to the problem of determining the *locus delicti commissi*.

In the cases, the question has arisen in connexion with applications for leave to serve out of the jurisdiction under R.S.C. Order XI r. 1 (*ee*) which provides that the court may grant leave where the action is founded on an alleged tort committed within the jurisdiction. It has been laid down that the grant of leave to serve out of the jurisdiction under Order XI is within the discretion of the court, and this point was emphasized in connexion with Order XI r. 1 (*ee*) in *Kroch* v. *Rossell*.[2] In that case, the defendants were publishers of papers in Belgium and France, and copies of the papers had been distributed in England. Leave to serve the defendants out of the jurisdiction was granted by a Master, and Greaves-Lord J. refused to set the order aside. The Court of Appeal reversed this decision. Counsel for the respondent argued that a publication of a libel in a newspaper took place every time a copy was sold.[4] Slesser L.J. stated that he was prepared to assume that a tort had been committed within the jurisdiction, although he made it clear that there was no need to determine this point for the purposes of the appeal. Scott L.J. also said that it was not necessary to decide this point. Both Slesser and Scott L.JJ. agreed that this was not a case in which leave to serve out of the jurisdiction should be granted. As Slesser L.J. said:

> '. . . the fact that the case might be tried in this country, and might be within the jurisdiction is not necessarily sufficient reason for allowing leave to be given to serve out of the jurisdiction. The various matters which have to be considered have been constantly before the courts: the question of the convenience of the forum, the question of under which laws such question as the place where the evidence may more regularly be obtained, where the case may more conveniently be heard, and a number of other considerations which it is perhaps unwise to attempt to define in any particular manner. . . . Primarily the matter is, of course, one of discretion for the learned judge.'[5]

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[1] [1944] 1 K.B. 432.

[2] (1937), 156 L.T. 379; [1937] 1 All E.R. 725.

[3] At p. 116.

[4] [1937] 1 All E.R. at p. 726. (The argument was not reported in the *Law Times*.)

[5] (1937), 156 L.T. 379, at pp. 380–1.

The discretionary nature of the jurisdiction was again stressed in *Monro*'s case.[1] There, the plaintiff, an English company, bought rat poison in New York from the defendant, an American corporation, under an agreement which provided that the contract was to be governed by New York law, and that the property in the goods was to pass in New York. An English purchaser suffered loss through the defective condition of the rat poison, and he recovered against the plaintiff, who claimed, in turn, to recover against the defendant. The plaintiff sought leave to serve the defendant out of the jurisdiction under Order XI r. 1 (*ee*). The Master granted leave and was upheld by Birkett J. The Court of Appeal unanimously reversed this decision. Scott L.J. based his judgment upon the discretionary nature of the jurisdiction under Order XI and refused to express any definite view on the tort question. He said:

> 'Even if it were possible to argue that any cause of action based solely on tort could be said to have arisen within the jurisdiction, it is not enough to satisfy the requirements of Or. XI. I express no opinion whether, if an act were committed within the jurisdiction, the resultant damage could properly be regarded as flowing from a tort taking place within the jurisdiction. It is not necessary to decide that question in the present case. . . . In the present case there is not even clear evidence before the court that the damage . . . was due to a tort committed by the American corporation within the jurisdiction. Prima facie, the corporation did nothing except manufacture the material. How it was used, what had happened to it, whether it had been interfered with in any way within this jurisdiction, there is no evidence.'[2]

In this case, Scott L.J. pointed out, the defendants had made careful provision, with the consent of the plaintiffs, to keep all claims within the exclusive jurisdiction of the United States courts, and it would have been outside 'both the letter and the spirit'[2] of Order XI to grant leave.

However, Goddard and du Parcq L.JJ. held quite clearly that no tort had been committed within the jurisdiction. Thus Goddard L.J. said:

> 'Here the alleged tort which was committed was a wrongful act or default. It was the sale of what was said to be a dangerous article without warning as to its nature. That act was committed in America, not in this country.'[3]

Du Parcq L.J. agreed. It was 'highly artificial'[4] to say that a tort had been committed within the jurisdiction. As the learned Lord Justice put it:

> 'The question is: where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, even though damage may be the gist of the action.'[5]

From these judgments it is clear that Goddard and du Parcq L.JJ. considered that no tort was committed in England in a case in which a substance was negligently manufactured in the United States and injured a purchaser in England. Scott L.J. was more cautious, and rested his judgment upon the ground that the Court was exercising a discretionary jurisdiction under Order XI. However, in *Bata* v. *Bata*,[6] Scott L.J., delivering the judgment of the Court of Appeal (Scott and Wrottesley L.JJ. and Wynn-Parry J.), held that the publication of an allegedly defamatory statement in England was a case falling within Order XI r. 1 (*ee*). The appellant claimed damages for libel arising out of the publication of a circular letter written by the respondent in Zürich, Switzerland, copies of which the respondent had caused to be posted in

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[1] [1944] 1 K.B. 432.

[2] At p. 437.

[3] At p. 439.

[4] At p. 440.

[5] At p. 441.

[6] [1948] W.N. 366.

Zürich to three persons in England. Leave to serve out of the jurisdiction was granted by a Master, whose decision was reversed by Jones J. on the ground that the cause of action did not arise within the jurisdiction. The Court of Appeal unanimously reversed this decision, holding that as copies of the letter were addressed to, and received by, persons in England, the alleged libel was published in England, and this brought the case properly within the Order.

It had been argued for the respondent that the alleged tort was committed in the place in which he had actually written the defamatory words, and *Monro*'s case was cited in support of this proposition. Scott L.J. characterized this argument as 'startling'. In *Monro*'s case, it had been decided that there was not sufficient evidence of negligent acts or defaults within the jurisdiction on the part of the American manufacturers. In the instant case, however, publication was essential to constitute the tort of libel, and had taken place in England. Therefore *Monro*'s case was 'irrelevant', and the instant case was one in which leave to serve out of the jurisdiction should be granted.

Having regard only to the judgment of Scott L.J. in *Monro*'s case, it is respectfully submitted that there is no doubt that that case was 'irrelevant' for the purposes of *Bata* v. *Bata*. Scott L.J. in *Monro*'s case, as in *Kroch* v. *Rossell*, had refused to decide the tort question, and had rested his decision squarely upon the discretion vested in the Court under Order XI. But, as we have seen, Goddard and du Parcq L.JJ. had specifically held that no tort was committed within the jurisdiction. Observing that they formed a majority in the Court of Appeal which decided *Monro*'s case, is it possible to maintain, as did the Court in *Bata* v. *Bata*, that the earlier case was irrelevant? It is a commonplace to say that no action for negligence can succeed unless a breach of duty and damage suffered therefrom is proved: that is to say, until the damage was suffered, no tort could have been committed in *Monro*'s case, and the damage which was the basis of the claim was suffered in England. This is the ground on which Cheshire attacks the judgments of Goddard and du Parcq L.JJ.:

> 'A tort must be committed before it can be said where it was committed . . . no act or default is tortious until all the things necessary to give the plaintiff a cause of action have occurred. If of three facts necessary to give a cause of action, only two have occurred, there is a tort in embryo, but not a complete tort. The third fact has still to occur, and it would seem that the place in which its occurrence completes the tort constitutes the locus delicti.'[1]

In fact, breach of duty and damage are ingredients of the tort of negligence, just as publication is essential to constitute the tort of defamation. It is difficult, therefore, to see how *Monro*'s case could be characterized as irrelevant in *Bata* v. *Bata*. Moreover, it does not seem to be justifiable to place cases of defamation within a separate category. Goddard L.J. in *Monro*'s case made reference to the case of defamation. Immediately after the passage from his judgment already quoted, he said:

> 'I think as du Parcq L.J. said in the course of the argument, that all that this rule is aiming at is the case where a foreigner comes to this country and commits a tort in this country, for instance, in driving a motor car and running someone down by negligent driving. That is not exhaustive. The tort may be a libel published by him here.'[2]

This passage, in which these two cases are placed side by side, suggests that what Goddard L.J. had in mind was a case of defamation in which the statement was both written and published within the jurisdiction. It is interesting to note that Wolff in his discussion of the problem treats defamation in precisely the same way as any other tort. His view is that the *locus delicti* is the country in which the defendant acted, and, from his example, it is clear that he means by this the country in which the libel is written. He states the following case: suppose A in State X writes to B in State Y a letter containing a statement which defames C. By the law of State X, and not by the law of State Y, the statement is protected by a defence of fair comment. Wolff's conclusion is that the defence should succeed wherever the action is brought, because State X *alone* is the *locus delicti*.[1]

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[1] *Private International Law* (3rd ed.), pp. 385–6.

[2] [1944] 1 K.B. 432, at pp. 439–40.

In view of *Bata* v. *Bata*, Wolff's view must now be treated as incorrect. But it is submitted, with respect, that there is no justification for treating differently a tort such as negligence in which damage is the gist of the action, and one in which publication is equally essential to ground liability. Only if we base the cases upon the discretionary element in the jurisdiction, is it appropriate to say that one case in which the discretion was exercised in one way is irrelevant in deciding whether to grant leave in another case. But, as we have seen, this was not the principal ground on which the majority in *Monro*'s case reached their decision.

Unless we make a special case of defamation—which seems altogether unjustifiable—it seems that the judgments of Goddard and du Parcq L.JJ. in *Monro*'s case and the unanimous decision of the Court of Appeal in *Bata* v. *Bata* are difficult to reconcile. Cheshire, as we have seen from the passage quoted, takes the view that the decision in *Monro*'s case is wrong so far as it depends on the place of tort. His view accords with the prevailing American doctrine that the *locus delicti commissi* is the country or state in which the last event necessary to make an actor liable for an alleged tort takes place.[2] This view has not been followed by all American courts,[3] and it has been powerfully criticized by Cook who advocates a doctrine, which has some judicial support in Germany, that the *locus delicti commissi* is in any country in which the wrongdoer acted or defaulted and in any country in which the effects of such act or default took place. In such a case, the person injured may select among these systems of laws that one which is most advantageous to him.[4] It is submitted that this is a reasonable view. In such a case as *Monro*, if the ingredients of a tort were all present, it seems that there would be little hardship in allowing the plaintiff to choose between New York law and English law. In *Bata* v. *Bata*, the choice would be between Swiss and English law. As the cases stand at present, *Monro*'s case, *per* Goddard and du Parcq L.JJ., is against this solution. *Bata* v. *Bata* is not so positively against it, because there the decision was that the tort was committed in England, but it is submitted that it is not obligatory to spell out of the case the proposition that Switzerland was necessarily excluded as a *locus delicti commissi*. If, however, it be argued that *Bata* v. *Bata* is authority for the proposition that the tort was committed in England only, then it is submitted that it is in conflict with the judgments of Goddard and du Parcq L.JJ. in *Monro*'s case for the reasons already stated: that a case in which damage is the gist cannot be distinguished from one in which publication is the gist; and that there is no sensible ground for placing cases of defamation in a special category. Moreover, if *Bata* v. *Bata* must be treated as authority for the proposition that the tort was committed in England *only*, it is submitted that it is to be preferred to the decision in *Monro*'s case, *per* Goddard and du Parcq L.JJ., for the reason stated by Cheshire—that it cannot be said that a tort has been committed until all the things necessary to give a plaintiff a cause of action have occurred. If English law rejects the doctrine advocated by Cook, it seems reasonable to say that the place in which the final event occurs, which completes the tort, constitutes the *locus delicti.*

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[1] *Private International Law*, p. 502.

[2] See Goodrich, *Conflicts of Laws*, s. 90; *Restatement of the Conflict of Laws*, s. 377. See also Hancock, *Torts in the Conflict of Laws*, pp. 171 ff.; Kahn-Freund in *Modern Law Review*, 7, pp. 242–5.

[3] Stumberg, *Conflict of Laws*, pp. 184–5.

[4] *The Logical and Legal Bases of the Conflict of Laws*, pp. 319, 345.

Zelman Cowen

THE DANUBE CONFERENCE OF 1948

The Convention of 23 July 1921, embodying the Definitive Statute of the Danube,[1] and providing for the establishment of the European Danube Commission for the lower course of the river, was signed by twelve states, seven of them riparian (Roumania, Hungary, Austria, Bulgaria, Yugoslavia, Germany, and Czechoslovakia), and five non-riparian (Belgium, France, Great Britain, Italy, and Greece). Neither Russia nor the United States participated in the conference, nor did they sign or accede to the Convention. The work of the two Commissions established by the Convention, during the period between the two World Wars, was, in the main, a success. Navigation conditions, especially in the Iron Gate section, improved considerably. However, the withdrawal of Germany from the International Commission in 1936 was followed by the Sinaia Agreement[2] of 1938, whereby the European Commission relinquished to Roumania most of the powers and privileges it possessed in Roumanian territory. The Sinaia Agreement represented a victory for Roumania, who had been protesting for many years against the direct authority exercised by the European Commission within her territory. Henceforth, the European Commission became, to all intents and purposes, an advisory body. As such, it was joined by Germany in 1939.[3] In 1940 Roumania became a satellite state of Germany, who at once undertook steps to reorganize the Danube Commission to suit German purposes. Meanwhile, the Soviet Union had re-annexed Bessarabia, thus becoming a riparian power once again, and she notified the German Government that she must be consulted in all decisions concerning the river. On 26 October 1940, by an agreement, the parties to which included Germany and the Soviet Union, both existing Commissions were 'liquidated' and replaced by a single Danube Commission, composed of the riparian states and Italy. Great Britain protested and reserved her rights as a member of the European Commission. The new Commission was destined to have a short life, for war broke out between Germany and the Soviet Union in 1941. During 1944 and 1945, the Soviet Union acquired *de facto* control over the Danube valley as far as Vienna, and the armistice agreements with Roumania, Bulgaria, and Hungary gave her control of shipping facilities on the lower Danube.

After the war, the policy of Great Britain, France, and the United States was to restore the principle of freedom of navigation, and throughout 1946 they strove to secure the insertion of the necessary provisions relating to the Danube in the peace treaties with Bulgaria, Roumania, and Hungary. It was soon evident, however, that the Soviet Union was determined to block attempts to raise this issue either in the Council of Foreign Ministers or before the United Nations. Only one clause relating to navigation on the Danube was included in the various peace treaties.[1] The Western Powers proposed that a conference be held to determine the new international régime for the Danube, and it was eventually agreed that such a conference should include representatives from the United States, Great Britain, France, and the Soviet Union in addition to representatives from the following riparian states—Ukraine, Bulgaria, Roumania, Yugoslavia, Hungary, and Czechoslovakia. Germany, lacking a central government, was obviously unable to participate, but the Western Powers were anxious that Austria be present. It was agreed with the Soviet Union that, once the peace treaty with Austria had been signed, she should be allowed to take part in any subsequent conference. As this treaty had not been concluded by the time the conference took place, Austria was allowed to attend only as an 'observer'.

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[1] Treaty Series No. 16 of 1922, Cmd. 1754.

[2] Treaty Series No. 38 of 1939, Cmd. 6069.

[3] Entry of Germany into the European Commission was accompanied by the accession of Germany and Italy to the Sinaia Agreement with one minor amendment: see Treaty Series No. 37 of 1939, Cmd. 6068.

The conference opened at Belgrade on 30 July 1948. From the first, it was evident that the British and French delegations were not prepared to surrender their rights acquired under the Convention of 1921 without being satisfied that the new Convention would in practice assure freedom of navigation. The Soviet representative urged that the Convention of 1921 was void: (*a*) *ab initio*, as the Soviet Union had not participated in its conclusion; (*b*) by reason of the systematic violation of the Convention by Great Britain and France in 1938 and 1939; (*c*) by reason of the application of the doctrine *rebus sic stantibus*; (*d*) as a result of the war.

As to the contention that the Convention of 1921 was void *ab initio* by reason of the non-participation of the Soviet Union in its conclusion, the British representative pointed out that the Soviet Union had in 1917 repudiated all the Tsarist treaties, and was therefore in no position to protest against a revision of the Danube régime.[2] Moreover, the Soviet Union, by virtue of Article 4 of the Convention of 1921, could have applied for representation on the European Commission on showing that she possessed 'sufficient maritime, commercial and European interests at the mouths of the Danube'. She did not do so.

More serious was the Soviet objection that, by concluding the Sinaia Agreement in 1938, and the Agreement relative to the entry of Germany into the European Commission in 1939, Great Britain and France had violated the provisions of the Convention of 1921. The Soviet argument was based on Article 42 of the Convention of 1921, which laid down that revision of the Convention could take place if two-thirds of the signatory states so requested, and specified the stipulations considered to be in need of revision. Thereafter, a conference of all signatory states was to be summoned. This provision, it was maintained, had been violated by the British and French Governments in 1938 when they concluded the Sinaia Agreement with Roumania, without consulting any of the other parties to the Convention of 1921. The British and French reply to this contention was that, in concluding the Sinaia Agreement, they were acting in accordance with Article 7 of the Convention of 1921, which stated that 'the powers of the European Commission can only come to an end as the result of an international agreement concluded by all the states represented on the Commission'. As the European Commission in 1938 consisted of Great Britain, France, Roumania, and Italy, and as the Sinaia Agreement was signed by three of these states and acceded to by the fourth, it was maintained that there had been no violation of the Convention of 1921.

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[1] E.g. Art. 34, Treaty of Peace with Bulgaria (Paris, 10 February 1947), Cmd. 7483, which states: 'Navigation on the Danube shall be free and open for the Nationals, vessels of commerce and goods of all states, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping. The foregoing shall not apply to traffic between ports of the same state.' The wording of this clause is exactly reproduced in the other peace treaties.

[2] See *The Times* newspaper, 4 August 1948.

Prima facie, these two articles of the Convention are hard to reconcile, and it is possible to argue, as did the Soviet delegate, that the two articles, read in conjunction, imply that for the European Commission to relinquish its prerogatives under the Convention is required the consent of two-thirds of the signatory states under Article 42, this fixed majority including all the members of the European Commission as required by Article 7. The procedure for revision would thus be analogous to that obtaining under the United Nations Charter for decisions of the Security Council on non-procedural matters, such decisions requiring a certain number of affirmative votes, including the concurring votes of the permanent members. That this interpretation of the Convention of 1921 is a strained one cannot be gainsaid, but it is a possible interpretation. To argue from it, however, that the Convention of 1921 is dead because the procedure for revision was not complied with in all its details is to run counter to an accepted rule of international law. The violation of a treaty by one party gives rise at most to a right of abrogation in the other parties; it renders the treaty voidable, not void. Even this statement may be too extreme. Some writers make a distinction between essential and non-essential stipulations of a treaty, and urge that only breaches of essential stipulations can create a right of unilateral abrogation.

Thus, while it may be possible to assert that the Sinaia Agreement was concluded in violation of the terms of the Convention of 1921, it is impossible to argue therefrom that the Convention of 1921 was thereby rendered invalid. Not one of the eight states whose rights under the Convention of 1921 might be deemed to have been infringed by the alleged violation of the Convention protested that the Sinaia Agreement contravened the provisions of the existing treaty. In default of such protests, and in view of the unanimity with which these states regarded the Convention of 1921 as being still in force, even as modified, it cannot be contended that the Convention of 1921 was abrogated by the signature of the Sinaia Agreement.

The argument that the Convention of 1921 has been rendered a nullity by reason of the operation of the doctrine *rebus sic stantibus* raises highly controversial issues. The changed conditions adduced to support the Soviet contention included the decision of the Council of Foreign Ministers in December 1946 to the effect that a new Convention for the Danube was necessary, and the circumstance that the Treaties of Peace with Bulgaria, Hungary, and Roumania contained provisions guaranteeing freedom of navigation on the Danube.[1] It would appear doubtful whether these instruments create a new state of things incompatible with the intention of the parties or the purposes of the original Convention. The Soviet Union and her satellites rejected the proposal put forward at the Conference by Great Britain that at least some of these circumstances should be investigated by an impartial body. Thus, Great Britain proposed to submit the question as to what international agreements relating to navigation on the Danube are now in force, and which states are party to them, to the International Court of Justice, or to a special tribunal set up by the United Nations, for an advisory opinion.[2]

The assertion by the Soviet representative that the Convention of 1921 was terminated by the war raises the interesting problem of the effect of war upon treaties. The true legal position on the subject is probably best stated by an American judge in a modern leading case. 'International law to-day does not preserve treaties or annul them regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice.'[1] This empirical approach to the problem leaves unsettled the question whether it is possible to categorize treaties and say that certain treaties are terminated, or whether it is necessary to base the conclusion reached upon the intention, express or implied, of the parties at the time of signature.[2] The same result would probably be reached in either case, for the intention of the parties as to whether the treaty would remain valid after the outbreak of hostilities is obviously closely connected with the nature of the treaty concerned.[3]

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[1] See *Dept. of State Bulletin*, vol. xix, no. 479 (5 September 1948), p. 289.

[2] *The Times* newspaper, 6 August 1948.

The history of the Danube itself since it was first internationalized offers interesting precedents for the effect of war upon treaties relating to freedom of navigation.[4] When war broke out in 1877–8 between Russia and Turkey, the belligerents took measures which resulted in the cessation of all commerce on the river,[5] and the suspension of operations by the European Commission. The Conventions of 1856 and 1871 were not, however, regarded as having been abrogated or suspended. When war broke out in Europe in 1914, the European Commission continued to hold regular sessions until the entry of Turkey and Bulgaria into the war. Even after that event, it carried on its work continuously, with the exception of one short period from May to November 1918. No suggestion was made that the war released any of the parties to the Conventions of 1856 and 1878. So far as the conditions of the war would permit, effect was given to the stipulations of these Conventions, and although freedom of navigation was suspended as between belligerent riparians and their enemies, the river commissions continued their work where possible.

The fact that these treaties were not challenged, however, cannot be adduced in support of the proposition that they were not capable of being challenged. The question whether or to what extent multilateral conventions are terminated or suspended by the outbreak of war between two or more of the parties is not one which admits of an easy answer. Seeing that the international régime of the Danube has been in operation for more than eighty years and had survived two major wars prior to 1939, the presumption must be that the framers of the Convention of 1921, in default of any specific provisions to the contrary, intended the new régime to be permanent and to survive any fresh outbreak of hostilities.

While the validity of the Convention of 1921 was being debated, the Soviet delegation introduced its draft convention for the new international régime. In many respects, this draft appeared to be retrogressive. Many of its provisions were challenged by the British, French, and United States representatives, and numerous amendments were proposed. However, all important amendments were defeated, and the Soviet draft was approved in substance and finally adopted almost word for word as the new Convention.[6] On the final vote, seven governments voted in favour of the Convention. The United States delegation voted against it, and the British and French delegations did not participate in the vote.

Article 1 of the new Convention has the same wording as Article 34 of the Treaty of

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[1] Judge Cardozo in *Techt* v. *Hughes* (1920), 229 N.Y. 222. For a similar view, see the judgment of the U.S. Supreme Court in *Karnuth* v. *United States* (1929), 279 U.S. 231, at p. 236.

[2] See Hurst in this *Year Book*, 1 (1921–2), p. 40.

[3] See McNair, *The Law of Treaties* (1938), p. 532.

[4] See Tobin, *The Termination of Multipartite Treaties* (1933), pp. 92–5.

[5] Chamberlain, *The Régime of the International Rivers: Rhine and Danube* (1923), pp. 63–7.

[6] The text of the new Convention can be found in *Documents and State Papers* (U.S. Dept. of State publication), vol. i, nos. 8 and 9, November and December 1948, p. 499.

Peace with Bulgaria[1] (and the corresponding articles of the peace treaties with Roumania and Hungary). The omission of the phrase contained in the Convention of 1921, to the effect that no distinction should be made between riparian and non-riparian states, is significant. The extent of the international river system is also reduced inasmuch as navigable tributaries and canals are excluded. The European and International Commissions are abolished in favour of a single Danube Commission, to consist of 'one representative of each Danubian state'.[2] This abolition of non-riparian representation provoked most controversy at the Conference, but all amendments designed to secure representation on the Commission of non-riparian states were defeated.

The functions of the Danube Commission include the preparation of a general plan of works, the execution of works incapable of being carried out by the states themselves, consultations with and recommendations to Danubian States and Special River Administrations, the creation of a uniform system of administration, the unification of regulations for the supervision of the river, the co-ordination of hydrometeorological services, the collection of statistical data, the publication of reference books, and the supervision of the execution of the provisions of the Convention.[3] There is no guarantee—unlike Article 10 of the Convention of 1921—that there shall be no discrimination in respect of access to and use of ports and their equipment. Although Article 41 of the new Convention provides that 'vessels entering ports for loading and unloading shall be entitled to use loading and unloading machinery, equipment, warehouses, storage space, &c.' and that 'there shall be no discrimination in determining the amount of costs for services rendered', the value of this article is qualified by the provision that use of port facilities shall be 'on the basis of agreements with the appropriate transportation and forwarding agencies'. Criticism of this restrictive clause was founded on the fact that, since the Second World War, there had been set up in the various Danubian countries state-controlled trading agencies which enjoyed special privileges and powers, and any further concessions to such agencies, especially in the matter of transport facilities, would exclude the possibility of non-discrimination. Moreover, even entry to the Danubian ports is to be on condition of conformity to the regulations established by the Danubian states concerned.[4]

More liberal are the provisions laying down that, in respect of port charges, 'there shall be no discrimination in respect to nationality of the vessels, points of departure and destination, or on any other grounds',[5] and that sanitary and police regulations will be administered 'without discrimination'.[6] The Convention provides for the creation of a Special River Administration in the lower part of the Danube between the mouth of the Soulina channel and Braila, and a Special River Administration for the Iron Gate section; the Danube Commission is to be informed of the provisions of the bilateral agreements on the basis of which these Administrations are to function, but it is not empowered to exercise any real degree of control over them.[7]

The procedure for the settlement of disputes as to the interpretation of the Convention is rudimentary. Disputes are to be referred to a Conciliation Commission, 'composed of one representative of each party and one representative appointed by the Chairman of the Danube Commission from among the nationals of a state which is not a party to the dispute'. The decision of the Conciliation Commission is to be definitive and binding, and there is to be no appeal. Abortive attempts were made to provide for a machinery of judicial settlement through the International Court of Justice. Grave concern was also expressed at there being no reference in the Convention to the relationship of the new régime to the United Nations. The Convention, which is to come into force on the deposit of six ratifications,[1] may be revised at the request of a majority of the signatory states.[2]

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[1] See above, p. 399, n. 1.

[2] Art. 5.

[3] Art. 8.

[4] Art. 24.

[5] Art. 40.

[6] Art. 26.

[7] Arts. 20–2: cf. Art. 33 of the Convention of 1921 which gave to the International Commission considerable powers of control over the special services set up to improve conditions on the Iron Gate section.

The new Convention was approved on 18 August 1948 by the seven riparian states. In stating that the British Government would not recognize the new Convention, the British delegate declared:[3]

> 'His Majesty's Government must therefore state categorically that they cannot recognise any new Danube Convention which claims to place certain users of the Danube in a monopolistic position, nor any Convention which denies to non-riparian Powers with major commercial interests in that waterway, any voice in the Commission which is to be responsible for its administration.'

A similar policy of non-recognition was made known by the United States. In a statement released to the press on 18 August 1948 the United States Government announced:[4]

> 'It is obvious that the United States cannot accept the draft convention which the Soviet Union is imposing upon its satellites. In the view of the United States, this instrument does not guarantee freedom and equality of trade. It does not fulfil the mandate of the Council of Foreign Ministers. The United States will not, of course, recognise, either for itself or for those parts of Austria and Germany which are under its control, the authority of any commission set up in this manner to exercise any jurisdiction in those portions of Austria and Germany.'

The new Convention cannot be said to have legally abrogated the rights enjoyed by Great Britain, France, Italy, Greece, and Belgium under the Convention of 1921. These rights, based upon the continuous recognition throughout the nineteenth and twentieth centuries of the concept of freedom of navigation on the Danube as being part of the 'public law of Europe',[5] are incapable of being modified without the consent, express or implied, of the states who participated in the Convention of 1921. More doubtful is the question whether the signatories to the new Convention have validly altered, as between themselves, the legal obligations towards each other which they assumed under the previous Convention. While the rights of Great Britain and France are in law to be determined by the Convention of 1921, it is not clear whether the rights and duties of Bulgaria, Roumania, Hungary, Yugoslavia, and Czechoslovakia are to be determined by the Convention of 1921 or the new Convention. It is submitted that these states have the power to alter their legal relationships as between themselves, and thus their rights and duties towards each other will now be based on the new Convention. As regards Great Britain, France, Italy, Greece, and Belgium, the signatories of the new Convention will be legally under an obligation to accord to them the benefits of the Convention of 1921.

The position of the United States is different. The United States, throughout the nineteenth century, asserted, in opposition to the views of Great Britain, that freedom of navigation on international rivers was a natural, rather than a conventional, right.[6]

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[1] Art. 47.

[2] Art. 46.

[3] See *Documents and State Papers*, vol. i, nos. 8 and 9 (November and December 1948), p. 507.

[4] See *Dept. of State Bulletin*, vol. xix, no. 480 (12 September 1948), p. 333.

[5] Art. XV, Treaty of Paris, 1856.

[6] See Bacon in this *Year Book*, 13 (1932), pp. 76–92.

In consequence, the United States was not a party to any of the treaty arrangements concerning the international régime of the Danube. Her claim to a voice in the post-war settlement of the Danube is based on the fact that she is at present the *de facto* authority in the two upper riparian states of Germany and Austria. Her refusal to recognize the new Convention means that the authority of the new Danube Commission will, in practice, extend upstream only so far as the junction of the American and Russian zones in Austria. The river will thus be divided, control on the lower Danube being exercised by the Danube Commission and on part of the upper Danube by the authorities of the United States.

I. M. SINCLAIR

ESPIONAGE AND IMMUNITY—SOME RECENT PROBLEMS AND DEVELOPMENTS

I

THE traditional text-book approach to the 'spy' sets him largely in the context of war or enemy occupation. In both settings the rules bore hard against him.[1] For in war the disguised agent, unacknowledged by his warring principal, could expect no sympathy from his captors, and very little legal ritual in the formality of his disposal.[2] Espionage in war-time, while 'legal',[3] gave the widest powers of punishment to the captor on the paradoxical theory that, though spying was within the law, the 'noxious'[4] spy, when caught, was without it to the extent that he could claim few rules to protect him and no state to acknowledge and defend him. The Hague Rules gave the customary legal position a documentary dignity without affecting the authority of the captor state to act with swift finality.[5] So the formal position of the disguised war-time agent was, in policy and law, much weaker than the means afforded to a state for its own self-protection.

What was true of the 'spy' proper was, by analogy, extended to the members of territory occupied by a belligerent. There the doctrines of 'War Treason' were able to provide powerful legal weapons for the occupant against the occupied.[6] Thus acts against the security of the conqueror were made a species of 'treason', exposing the actor to the swiftest of summary punishments. Here again the rules of war had the highest regard for the necessary measures of self-defence available to a state engaged in war.

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[1] Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1944), pp. 328–31, particularly the introductory references at pp. 328–9; Hyde, *International Law*, vol. iii (2nd rev. ed. 1945), pp. 1862–5; Moore, *Digest of International Law*, vol. vii, p. 232; *Manual of Military Law*, 1929 (H.M. War Office), pp. 296–7, 340–2; Hall, *International Law* (8th ed. 1924), p. 650; Saldaña, 'La Justice Pénale Internationale', in *Hague Recueil*, 10 (1925), p. 305; Pella, 'La Répression des Crimes contre la Personalité de l'État', ibid. 33 (1930), pp. 677 ff. See also *Ex parte Quirin et al.*, 317 U.S. 1.

[2] *Manual of Military Law*, 1929, p. 297; *Rules of Land Warfare*, para. 202 (*b*) and (*c*), (War Department of the United States), cited in Hackworth, *Digest of International Law*, vol. vi (1943), pp. 304–6.

[3] Oppenheim, Hall, Hackworth, and other writers assume the 'legality' of espionage, but Hyde suggests that 'a more satisfactory explanation is within reach. It is found in the fact that the conduct of the spy is in reality at variance with the laws of war which are a part of the law of nations, and by implication also a part of the local law of the individual state' (op. cit., p. 1865). Hyde relies in part on the decision of the United States Supreme Court in *Ex parte Quirin et al.* (1942), 317 U.S. 1, also reported in *Annual Digest of Public International Law Cases*, 1941–2, Case No. 168. See also the comment on the case by Hyde in *A.J.* 31 (1937), p. 88. The Supreme Court seems to suggest that spies are belligerents 'offending against the laws of war' (*per* Stone C. J.).

[4] The expression is Hall's (op. cit., p. 651).

[5] Higgins, *The Hague Peace Conferences* (1909), pp. 238–9.

[6] Oppenheim, op. cit., pp. 331–2, 454–6; Hyde, op. cit., p. 1805; Hackworth, op. cit., p. 308.

In marginal cases chancelleries, as well as occupation and field commanders, may have been troubled with the question whether a suspect was a 'spy' within the broad definition of the law,[1] or had quietly engaged in 'war treason'—which, in strictness, most of the underground and resistance movements in German-occupied territory in World War II must be considered to have done.[2] But for the most part it is doubtful whether more than prima facie proof was required to support even a capital decision.[3] Probably most of the cases lent themselves to summary judgments which were administrative rather than judicial in approach and technique. Studies which examine Nazi occupation methods have yet to be published, and scholars have yet to evaluate the role and the status in World War II of the 'spy' and the participant in 'War Treason'. But these questions, like so much else in the rules of war, seem narrow in the possibilities of their creative contribution to international law. It is not likely that any detailed codification of extensions from the older rules of 'espionage' and 'war treason' will be called for. Even if there is some such demand it cannot be said that this kind of study and reformulation would touch what may now, perhaps, be regarded as the really interesting and significant questions in inter-state relations affected by the practice of espionage.

For the nice contemporary issues are those that touch the problem of the 'spy' in peace-time—if the Law of Peace knows of such a species.[4] Here are to be found not only problems of definition, but also fine questions of the role of legation, the conception of diplomatic inviolability and immunity, the municipal and international issues arising out of the disclosure of state secrets by nationals to staff members of accredited foreign missions—whether those nationals are private citizens or public officials—and, finally, all matters of clandestine aid and comfort to a foreign Power which is not an enemy at war. Indeed, probably for the first time since the eighteenth century there may be need to re-examine on the one hand the nature of diplomatic immunity, and on the other the meaning of disloyalty in peace-time by nationals who deal in the security of their state for the sake of money, power, or ideology. Perhaps in no other state have the issues been so fully outlined as in Canada, where, since 1945, the Report of a Royal Commission on Espionage,[5] and the series of prosecutions of civil servants and others which followed, have posed many curious questions which have not yet been fully resolved—questions of interest to international as well as to municipal law.

What has made these questions of immediate political and legal concern has been the emergence of apparently new techniques in the mechanics of inter-state relations. These techniques suggest that the traditional concepts of the role and limits of diplomatic immunity in international affairs are now challenged by certain states which yet retain all of the juridical advantages of the traditional view for the conduct of their own international relations.[1] In the midst of, and parallel to, traditional methods of formal inter-state relations, there have arisen other standards and methods which not only have significance for international law and international relations, but also raise unusual questions of municipal security.[2] The special experience of Canada provides a short case-history of this new dilemma.

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[1] See Saldaña, op. cit., on the difficulties of definition.

[2] Lemkin, *Axis Rule in Occupied Europe* (1944), *passim.*

[3] The Spy or War Traitor would be punished for committing 'War crimes'. See Oppenheim, op. cit., pp. 331, 451, 456; *Manual of Military Law*, 1929, cap. xiv, pp. 450–1.

[4] Peace-time 'spies' are mentioned in Oppenheim but not by Hyde and Hackworth. 'Spies are secret agents of a state sent abroad for the purpose of obtaining clandestinely information in regard to military and political secrets' (Oppenheim, op. cit., vol. i, p. 772).

[5] *The Report of the Royal Commission to investigate the Facts and the Circumstances surrounding the Communication by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to a Foreign Power*, Ottawa, 27 June 1946, hereinafter referred to as *Report.*

II

In September 1945 Igor Gouzenko, a cipher clerk employed by the U.S.S.R. in its embassy in Ottawa, took a number of secret documents from files within the Embassy, and, after seeking and obtaining the protection of the Canadian Government, handed these documents over to it.[3] His disclosures, presumably corroborated by the documents, led shortly afterwards to secret personal missions by the then Prime Minister, the Rt. Hon. W. L. Mackenzie King, to London and Washington—so grave did the Government believe the disclosures to be.[4] For Gouzenko had alleged that the Soviet Government, through its Ottawa Embassy, had inspired and directed a series of parallel and competing espionage organizations in Canada, whose membership included not only ordinary Canadian citizens but military personnel, civil servants, research scientists, and one parliamentary figure, many of whom may have had access to valuable security information. Doubtless it was the possibility of a 'leakage' about the atomic energy programme that was particularly embarrassing to Canada at that time, since apart from the United States and the United Kingdom only Canada among all the allies shared the knowledge of the atomic bomb. Moreover, as Mr. King himself has indicated, the entire affair was a profound shock to a Government and people accustomed to more direct and formal measures for the exchange of 'information' among allies.[4]

To meet the apparent security emergency, the Government took steps, by Order in Council of 6 October 1945,[5] to provide the federal police authorities in charge of the inquiries—the Royal Canadian Mounted Police—and the Minister of Justice with the widest powers of interrogation, detention, and search.

After the authorities had conducted intensive preliminary inquiries the Government appointed a Royal Commission,[6] comprising two judges of the Supreme Court of Canada, to make the fullest inquiry into the entire circumstances. The Commission submitted its final Report to the Government on 27 June 1946.

From the point of view of international law one effect of the Report was at once to raise the question as to what were to be the legal consequences of an act by one state, through certain of its accredited agents, which was designed, through obtaining confidential information, to undermine the security of a friendly host state. While this question had often been in the minds of states when, in the inter-war years, they began to recognize and to resume relations with the U.S.S.R.,[1] the matter had been dormant for some time, certainly throughout the period of the recent war-time alliance. It is true that the Report did not mean that the Government of Canada formally charged the Soviet Union before the world—although, following an interim report of the Commission, the Prime Minister, Mr. Mackenzie King, had specifically referred to the Soviet Union as the foreign power concerned.[2] But the allegations were made by an instrumentality of the Government, an official commission of inquiry set up by the Government for governmental purposes. Presumably, upon the publication of these findings, the following courses were open to Canada:

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[1] See, for a Soviet view of International Law, Korovin, 'The Second World War and International Law', in *A.J.* 40 (1946), p. 742.

[2] The material on the Soviet view of *bourgeois* societies is now too extensive to require citation. The translated writings of Lenin and Stalin are quoted extensively by Historicus in *Foreign Affairs*, 27 (1949), p. 175, and by Beloff, *The Foreign Policy of the Soviet Union 1929–41* (1947).

[3] *Report*, pp. 11–17, 637–48.

[4] See Statement of the Prime Minister, Mr. W. L. Mackenzie King, on 18 March 1946 (*Parliamentary Debates, House of Commons*, pp. 44–54).

[5] P.C. 6444.

[6] P.C. 411, 27 June 1946.

1. It could have regarded the findings of the Commission as evidence of an unfriendly act and could have severed diplomatic relations.[3]
2. It could have indicated its displeasure by withdrawing senior diplomatic personnel.[3]
3. It could have demanded the recall of all those members of the Soviet Embassy in Ottawa, whose complicity in the various espionage 'rings' had been proven or was suspected.[4]
4. It could have charged any implicated Soviet Embassy personnel under Canadian criminal law if the Ambassador or the Government of the U.S.S.R. were willing to waive the immunity of any such personnel.[5]
5. It could have prosecuted Soviet agents who were not entitled to diplomatic status and thus to 'immunity', if any such agents were known to have been involved or were suspected of participation in any espionage activities.[6]
6. It could have prosecuted, under Canadian Criminal Law, any Canadian, or any alien who had no special status entitling him to immunity, when any of these were found by the Commission to be participants in spy rings, or to be otherwise implicated.

The Canadian Government did not permit the event to lead to full diplomatic rupture, but heads of missions were withdrawn, and the recall of unacceptable Embassy personnel in Ottawa was requested. Municipally, a series of arrests and prosecutions were initiated over a period of three years against twenty Canadian public servants, military personnel and others, but against no Soviet nationals. The nature of the prosecutions and their significance for international law will be discussed below. Here, however, it is perhaps enough to point out that the principal witness for the prosecutions, as he had been for the Royal Commission, was the Soviet cipher clerk Gouzenko, while the principal documentary evidence at the trials, as before the Commission, were the files of the Soviet Embassy which Gouzenko had taken and with which he sought to corroborate his oral testimony. Indeed, a large part of the Commission's Report deals with these files, and the link between the various persons mentioned in the Report and these files[1] became, in large measure, the basis for the Commission's findings and the prosecutions which followed.[2]

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[1] The United States, for example, were concerned with the limitation of propaganda and subversive activities sponsored by the U.S.S.R. as a condition of recognition. See Hackworth, op. cit., pp. 194–5. For Litvinov's assurances of non-interference see ibid., pp. 304–5. For extensive references to the literature concerned with Soviet responsibility for the activities of the Communist Party see Oppenheim, op. cit., vol. i, p. 261, n. 2. See also Verdross in *Zeitschrift für öffentliches Recht*, 9 (1930), pp. 577–82.

[2] See a Statement by Mr. Mackenzie King to the House of Commons (*Parliamentary Debates, House of Commons*, 18 March 1946, pp. 44–54). In his first public statement Mr. King did not formally name the Soviet Government as the Foreign Power concerned.

[3] For examples of grounds of severance of diplomatic relations see Hackworth, op. cit., vol. vi, pp. 147–9, and Oppenheim, op. cit., vol. i, p. 693. For the view that withdrawal of recognition should not follow the rupture of diplomatic relations as a measure of disapproval, see Lauterpacht, *Recognition in International Law* (1947), pp. 354–5, and Hyde, op. cit., vol. ii, pp. 1656–7.

[4] For examples of grounds of recall or expulsion of diplomatic personnel see Hackworth, op. cit., vol. iv, pp. 447–52; Satow, *Diplomatic Practice* (1922), pp. 381 ff. See also the detailed references in the comment to Arts. 12 and 13 of the *Draft Convention on Diplomatic Privileges and Immunities, Harvard Research*, 1932, pp. 77–9; Oppenheim, op. cit., vol. i, pp. 729–30; Hall, op. cit., pp. 359–60.

[5] Oppenheim, op. cit., vol. i, pp. 708–9, 724–5; Hyde, op. cit., vol. ii, pp. 1268–9.

[6] Such jurisdiction over aliens is too well settled to require extensive documentation. See Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 96–7; Hackworth, op. cit., p. 84; Moore, op. cit., vol. ii, p. 97; Hyde, op. cit., vol. i, pp. 729–30; Oppenheim, op. cit., vol. i, pp. 619 ff.

At no time, however, was it suggested by Canada, in any statement so far made public, that the acts of members of the Soviet Embassy staff amounted in law to a 'wrong'—a delict—on the part of the U.S.S.R.[3] for which the Government of Canada could and should claim some form of reparation.[4] Probably, if these events had happened between states of relative equality in strength and size, and contiguous in geography, some kind of reparation might have been sought under the threat of full diplomatic rupture and war. But it is significant, nevertheless, that the view that a form of international delict had been suffered by Canada, which could and should give rise to a claim for some satisfaction, even if only as perfunctory an act of satisfaction as an apology for the excessive zeal of accredited agents, did not occur to the Canadian authorities, or, if it did, that no public expression has been given to it. This is so despite the fact that the Soviet Government in its explanation of and reply to the Prime Minister's first statement virtually admitted the facts as alleged.[5]

III

From the point of view of customary international law the work of the Royal Commission had its most direct effect through the issues that arose before the courts as a result of prosecutions following the recommendations of the Report. Altogether twenty persons have been charged or brought to trial. Of these, ten were acquitted, or their convictions were quashed; nine were found guilty; in two cases the Crown entered a

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[1] See *Report*, pp. 633–4, for the Commission's views on the link between the files and the persons named therein.

[2] See ibid., pp. 627–32, for the Commission's conviction that the documents were authentic.

[3] This doubtless is a controversial matter, but it would seem that extensive acts of espionage endanger the security of the receiving state, and that the recruiting of citizens and servants of the receiving state for espionage is an affront to the dignity of a state, and a threat to its independence and integrity. Moreover, such acts, when committed by an Ambassador or his staff, are a violation of the duty of an accredited diplomatic agent to conduct himself peacefully and faithfully in his relations with the receiving state. It is arguable that such conduct by the accredited agents of a foreign state amounts to an international delinquency. See Borchard, op. cit., pp. 185–9; Oppenheim, op. cit., vol. ii, p. 318; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 134–43; Hall, op. cit., pp. 268–9.

[4] Oppenheim, op. cit., vol. ii, pp. 318–19.

[5] It should be noted that, in reply to the statement made by Mr. King on 15 February 1946, Solomon Losovsky, Deputy Commissar of Foreign Affairs, stated on 20 February 1946, *inter alia*: '. . . None the less, as soon as the Soviet Government became aware of the above-mentioned acts of certain members of the staff of the Military Attaché in Canada, the Soviet Military Attaché, in view of the inadmissibility of the acts of members of his staff in question, was recalled from Canada. On the other hand, it must also be borne in mind that the Soviet Ambassador and other members of the staff of the Soviet Embassy in Canada had no connection with this.' See *Report*, p. 628.

Stay of Proceedings, dropped the charges, or the accused were discharged at the preliminary hearings. Of those charged twelve were Canadian or British civil servants, either temporary or permanent, or were employees of the Government other than civil servants; one was a member of Parliament; four were members of the armed forces; and three were private individuals.[1]

Not all of the cases have been reported,[2] but the few that have are enough to indicate the main legal issues raised. Since the U.S.S.R. had not waived the immunity of any of the Embassy personnel accused in the Report of participating in espionage, no action was taken to lay charges against them. Now, clearly, any charges to be laid would have to be such as were crimes by the municipal law of Canada. There was no rule of customary international law dealing with peace-time 'espionage'—whatever its precise definition—that might have provided a legal basis for a prosecution in a municipal court such as would have been the case for crimes against the 'Law of Nations' strictly so called, such as piracy.[3] Hence, properly to found a charge against those Canadian citizens and resident aliens who were named in the Report, there had to be some provision in the existing municipal criminal law of Canada.

The reported cases disclose that the Crown and the courts were able to find an adequate basis in the provisions of the Official Secrets Acts of 1939,[4] supplemented by the general doctrine of criminal conspiracy as formulated specifically in the Canadian Criminal Code[5] as well as in the rules of the common law of crimes as recognized and applied by Canadian courts wherever the Criminal Code might speak without clarity and completeness.[6] A study of the reported cases shows that only a few of the accused were charged directly with a breach of the Official Secrets Act. In most of the cases the alleged offence was a conspiracy to violate or to induce a breach of the provisions of the Act, or to commit an 'indictable offence' otherwise not fully stated. Of particular interest to this paper, however, are the following matters:

1. The admissibility of Gouzenko's evidence as well as of the documents from the Embassy archives.
2. The effectiveness of the Official Secrets Act to control the disclosure of unauthorized information.
3. The place of 'conspiracy' in dealing with persons whose conduct does not bring them directly within the provisions of the Official Secrets Act.

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[1] These statistics are the author's compilation from press reports in the files of the *Montreal Gazette*. No official statement has been prepared by the Government. Some of the statistics overlap since certain of the accused were acquitted on one charge but not on others.

[2] Of the twenty prosecutions only nine so far have led to reported judgments by trial judges or Courts of Appeal:

Rex v. *Woikin* (1946), 1 C.R. 224.
Rex v. *Adams* (1946), O.R. 506.
Rex v. *Rose* (1946–7), C.R. 107; aff'd (1947) 88 C.C.C.
Rex v. *Mazarell* (1946), O.R. 511; appeal dismissed, ibid., p. 762.
Rex v. *Harris* (1947), O.R. 461.
Rex v. *Smith* (1947), O.R. 378.
Rex v. *Benning* (1947), O.R. 362.
Rex v. *Gerson* (1947), O.R. 715.
Rex v. *Lunan* (1947), O.R. 201.

[3] See *Harvard Research*, *Piracy* (1932), pp. 749–60; and *Jurisdiction with respect to Crime* (1935), pp. 563–92. See also Oppenheim, op. cit., vol. i, p. 307.

[4] (1939) 3 Geo. VI, c. 49.

[5] R.S.C., 1927, c. 36 (as amended). For comments on conspiracy see also Tremeear's *Criminal Code* (1944), pp. 632–3.

[6] Tremeear, op. cit., pp. 632–3.

In most of the cases, reported and unreported, the admissibility of Gouzenko's evidence and of the documents were issues of crucial importance, and, indeed, in two of the reported cases tried in two different provinces the issues were passed on by the respective Courts of Appeal.[1] The Crown used Gouzenko's evidence for both main classes of charges, namely (1) those alleging a breach of the Official Secrets Act, and (2) those alleging a conspiracy to commit a breach of the Act.

In both charges it was logical for the defence to rely substantially on the credibility of Gouzenko who was a co-conspirator, and on the admissibility of his evidence as a member of the Embassy staff, and to rely, too, on the admissibility of the documents which prima facie were the property of a foreign sovereign, and were part of the 'archives' of his Embassy. Very little attention was given in the three main judgments[2] to the problem of Gouzenko's own immunity since he was a volunteer and his former employer, the Ambassador and the Soviet Government, took no steps to prevent him from testifying by claiming immunity for him.[3] But the documents were another matter. The issue of their admissibility has a distinct interest for students of international law because it touches on the traditional problem of 'diplomatic immunity', and, conversely, because it suggests the line at which the police power of the state, for its own security, may limit the theory and practice of the right of legation. Other issues arose both in the reported and unreported cases, but these largely touched on procedural and substantive questions of criminal law which are not of direct interest to this paper.

Rex v. *Rose* is perhaps one of the most interesting of all the cases. Rose was a Labour Progressive Party (Communist) member of the House of Commons at the time of his arrest and trial, and, indeed, at the very time of the commission of the offence. He was accused of conspiring with a research chemist employed on a war-time project to obtain information about a secret explosive partly developed in Canada by that chemist, the formula of which was 'top-secret'. Rose was alleged to have passed the secret on to Soviet Embassy personnel. He was charged both with conspiracy and with the substantive offence of breaking the Official Secrets Act. At the trial objections were raised that the Embassy documents were 'diplomatic documents' and therefore not admissible in evidence because of their 'immunity'. It will be remembered that these papers were taken by Gouzenko from certain files in the Soviet Embassy, and prima facie their presence there and their contents suggested that they were part of the 'archives' of the Embassy.[4] The trial judge, Lazure J., rejected the plea of 'immunity' on the following grounds:

1. Diplomatic immunity can be invoked only by the foreign Government interested in the matter 'through its ambassador or duly appointed representative'.
2. The privilege is personal to the Ambassador, his entourage and papers, but it can be claimed only when the Ambassador or any members of his staff are sought to be tried, or legal process is issued against their property.
3. Where the accused is himself not a person by whom the privilege of immunity may be invoked, he has no claim of immunity for himself or for any documents brought before the Court.

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[1] *Rex* v. *Lunan*, *supra*, and *Rex* v. *Rose*, *supra*.

[2] Ibid. (two decisions in *Rex* v. *Rose*).

[3] There would have been an interesting situation had the Ambassador or the Government of the U.S.S.R. requested the Court not to entertain Gouzenko's evidence, on the ground that his immunity could not be waived by himself, but only by his sovereign. Cf. *Rex* v. *A.B.*, [1941] 1 K.B. 454, which is really the converse case.

[4] Oppenheim, op. cit., p. 708; Hall, op. cit., p. 231; Hyde, op. cit., p. 1253.

4. If an Ambassador wishes to invoke any immunity privileges he should make his claim to the Department of External Affairs, where international claims and differences between Canada and a foreign state are usually brought. The Court has no reason to be interested whether the Ambassador in this case would or would not waive any right to immunity.
5. The Statute of 7 Anne, c. 12, may not be the law of Canada, and in so far as it required judges to take judicial notice of the status of persons protected by the statute it 'goes too far in view of modern jurisprudence'.
6. These documents are not 'diplomatic papers' in a proper sense, since they are 'espionage reports' of espionage agencies in the Soviet Union and in Canada, and since the employment by the U.S.S.R. of the witness Gouzenko and his espionage colleagues and superiors at the Embassy as diplomatic personnel was 'fictitious'.
7. The evidence of espionage concerns the security and welfare of Canada, and as such 'it supersedes to some extent any diplomatic immunity'.
8. It is not the concern of the Court to inquire into the manner by which exhibits were brought into court by a witness if such evidence is otherwise 'legal and pertinent'.

A number of these grounds—though all were stated very shortly by the Court—are worth examining as being among the first attempts of Canadian courts to approach the problem of the diplomatic immunity of 'papers',[1] and as being among the few recent decisions of Anglo-American courts on the question of immunity in a *criminal* matter, and one in which the problem of immunity arose in so curiously *indirect* a fashion.[2]

The first ground raises the question whether the notion of 'immunity' adheres *ab initio*, and is therefore effective in barring any legal process unless there is a positive act of waiver by the Sovereign or his accredited representative, or whether it is a 'privilege' to be 'claimed', so that jurisdiction may be exercised over person and property until such a claim is made. The literature on the subject is by no means clear.[3] It is possible to argue that customary international law had long recognized an inherent 'quality' of immunity. Thus the Statute of 7 Anne, c. 12, is often said to have been declaratory of customary rules, the violation of which it made punishable in the sphere of municipal law.[4] Doubtless specific issues of immunity can only be determined juridically if and when a court has to decide upon a specific claim for such immunity. But it must, it seems, be admitted that a kind of *a priori* immunity attaches to certain classes of diplomatic agents, their entourage and property, and that by the positive law of England it is wrongful to subject any of them to legal process. On the other hand, the insistence of British courts in recent years that immunity from jurisdiction is a privilege to be conferred by the host state, and not a precedent absolute right[1]—such as a theory of extra-territoriality would require—seems to fit better the notion of the supremacy of the state over persons and things within its territory, and the notion that immunity is only a 'privilege' and thus limited in scope for reasons of law and reasons of practical international relations.

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[1] Cf. *Maluquer* v. *Rex* (1924), 38 Que. K.B.I. (Immunity of Consulate premises and 'archives').

[2] Cf. *Rex* v. *A.B.*, [1941] 1 K.B. 454. An employee of the U.S. Embassy in London was found guilty of an offence under the Official Secrets Act for theft of Embassy documents and their use contrary to the provisions of the Act. His plea of immunity was rejected as he had ceased to be an employee of the Embassy at the time the charge was laid against him.

[3] Hackworth (op. cit., vol. iv, p. 562), Hyde (op. cit., vol. ii, p. 1271), and Oppenheim (op. cit., vol. i, pp. 708–10) seem to suggest that a quality of absolute inviolability inheres in premises and archives. Hall doubts this (op. cit., p. 231).

[4] Lord Buckmaster in *Engelke* v. *Musmann*, [1928] A.C. 433, 440: '. . . My Lords, the privilege of affording ambassadors and other accredited representatives of foreign countries immunities from all writs and processes is an ancient doctrine of the Common Law declared in terms by the Statute 7 Anne c. 12.' See also Oppenheim, op. cit., vol. i, p. 708, n. 1.

From the decision that there is no 'absolute right' to immunity affecting both persons and things and operative whether it was invoked or not, it followed—although the Court did not state this—that such immunity could only come into effect when it was claimed by one for whose benefit the privilege in law existed. Thus a third person could not raise the question of immunity of documents when he was not himself entitled to make any such claim on his own behalf, or on behalf of others, such as an Ambassador makes on behalf of a member of his staff. The documents therefore were not *a priori* immune, but carried only a 'privileged immunity' from seizure or examination if a proper claim was made by one having the status to do so.[2]

Such reasoning has much to support it. But when His Lordship proceeded to suggest, *obiter*, that any such claim for immunity of persons or things would have to be made by an Ambassador to the executive power of the host state rather than to the Court, it was evident that the Court was raising the issue, hitherto free of controversy, as to how far the rules of customary international law were to be recognized and applied by a Canadian court.[3] For it would appear that the only role available to the Executive is that of certifying, in answer to the Court's request for information, as to the recognized, sovereign status of the state, government, or head of state concerned.[4] Once the Court is made aware of such status and recognition by a certificate of the executive, the general rules of customary international law apply and the court is bound to afford 'immunity' to the person or property of the sovereign or his accredited representative or to others properly within the scope of the privilege. Indeed, the shift from judiciary to executive of the decision what states, governments, or agents shall be entitled to the privilege of immunity provides, perhaps, a satisfactory division of authority, without suggesting further that all claims of immunity must also be addressed to the executive before a court will act upon them.[5]

Another interesting aspect of the opinion was the suggestion that the Gouzenko documents did not come within the definition of 'embassy archives'. For the decision argues that these documents were not embassy papers but rather 'espionage reports' prepared under the guise of 'fictitious' embassy employment by those operating the

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[1] *Chung Chi Cheung* v. *The King*, [1939] A.C. 160; *Dickinson* v. *Del Solar*, [1930] K.B. 376; *In re Moriggi*, *Annual Digest of Public International Law Cases*, 1938–40, Case No. 172; *Afghan Embassy Case*, ibid., 1933–4, Case No. 166. Hall early opposed the absolute view of exterritoriality (op. cit., pp. 218–20, 301–10). For a more reluctant admission of the fictional character of exterritoriality see Oppenheim, op. cit., vol. i, p. 711.

[2] There are nice Hokfeldian questions of terminology involved in the frequent description of 'immunity' as a 'privilege'. Cf. Hokfeld, *Fundamental Legal Conceptions* (1923), p. 23; Paton, *Textbook of Jurisprudence* (1946), pp. 213–17.

[3] Cf. *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa, &c.*, [1943] S.C.R. 208, *Annual Digest*, 1941–2, Case No. 106; *West Rand Gold Mining Co.* v. *The King*, [1902] 2 K.B. 391. For further illustrations of the views of Anglo-American courts see Hudson, *Cases in International Law* (1936), pp. 778 ff., and Briggs, *The Law of Nations*, Cases, Notes, and Documents (1946), pp. 234 ff.

[4] For the role of the Foreign Office Certificate see Lyons in this *Year Book*, 23 (1946), p. 240.

[5] For examples of judicial notice of the rules of customary international law see *City of Berne* v. *Bank of England* (1804), 9 Ves. Jun. 347; *Triquet* v. *Bath* (1764), 4 Bing. 1478; *Taylor* v. *Barclay* (1828), 7 L.J. (O.S.) Ch. 65. See also Roscoe, *Digest of the Law of Evidence* (20th ed. 1934), p. 26.

'spy rings' in Ottawa and Moscow. Now it is one thing to say that archives are not immune absolutely but only relatively to the particular position of the person claiming immunity, and that, therefore, no immunity is deemed to be present unless it is established by a proper claim. It is quite another matter to suggest that the Court is competent to determine which of many documents in the files of an Embassy are properly within the scope of 'normal' diplomatic intercourse and relate to the Ambassador's duty as ambassador, and which are papers that are not within the limits of the activities of the Embassy.[1]

Finally, reference may be made to the interesting observation that a court need not inquire as to how evidence tendered to it came to be obtained, if that evidence is otherwise 'legal and pertinent'.[2] This is perhaps a somewhat debatable position. For such a view, if carried to a logical end, would contradict the principle that the courts apply rules of law which have the general 'consent' of nations and/or of the courts of the adjudicating state. To accept this view would mean that documents stolen from an Embassy and presented in evidence by the Crown could be retained by the Court, even where the Ambassador or his representative makes a claim to the Court for their 'immunity', and used for all evidentiary purposes as if their immunity were, legally, an irrelevant question.[3]

It has been thought desirable to treat in some detail this brief judgment on a matter of evidence at the trial because of the number and variety of the points dealt with by the Court in deciding that the documents were admissible in evidence. On appeal, the conviction was affirmed, and the Quebec Court of King's Bench, Appeal Side, dealt again in detail with the problem of the documents and the status of the oral testimony of Gouzenko. Bissonette J., in an interesting examination of the questions of international law raised by the appellants, decided that 'immunity is relative'. But he was unable quite to satisfy himself as to whether the documents were 'diplomatic papers' or not. The main ground of his opinion was, first, that the security of the state is superior to any immunity conferred on a diplomatic agent, and, secondly, that a Canadian citizen cannot claim any of the advantages of such a privilege. But the judgment also alludes to the trial Court's opinion that, since the executive had not dealt with the documents as if they were immune—having introduced them in evidence—the Court was bound to follow its lead. In any case, said His Lordship, to grant immunity to such papers when the foreign state itself has not claimed such privilege '. . . would be casting a slur upon its dignity, its sovereignty, and, through a gesture as ungracious as unexpected, would elevate a simple suit to a degree of international importance and create, at least in theory, a diplomatic conflict contrary to the will of the executive power itself'.

While the national security is a valid ground for the decision, it may not be necessary to accept the view that the executive by its own act can render certain property—the archives—of the Embassy no longer immune from jurisdiction, while in all other respects sovereign status and rights of legation are recognized. It would have been much simpler had the Court allowed the case to rest on the broad ground of security and, perhaps, also on the doubtful status of claims for immunity made in the course of criminal proceedings by third persons who are not themselves members of an accredited mission,[1] instead of venturing into reasoning which narrows the effectiveness of customary international doctrine by widening the power of the executive to decide on matters hitherto reserved for the judiciary. A series of retaliatory devices might be encouraged by suggesting that individual executive acts by a state should determine in detail how far its courts of law shall extend privileges of immunity to persons and things having in other respects a status entitling them to such privileges.

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[1] Cf. *Harvard Research, Diplomatic Immunities*, 1932, pp. 61–2. The Draft Convention provides for the protection of 'correspondence', and could scarcely have attempted to formulate distinctions between different types: '(archives) . . . are more than the mere property of a sending state. They are property having a special and confidential quality.' See also Hyde, op. cit., p. 1251.

[2] 'Legal' evidence probably includes the question as to its status before the Court, i.e. its 'privileged' position and thus its admissibility. Cf. Wigmore, *Evidence* (3rd ed. 1940), vol. 8, par. 2372 ff.

[3] Cf. *Harvard Research, Diplomatic Immunities*, 1932, p. 62.

In *Rex* v. *Lunan*[2] these questions were studied also by the Court of Appeal of Ontario. Here, again, the accused was charged with conspiring to commit a breach of the Official Secrets Act. In affirming the conviction the Court dealt with the plea that both Gouzenko's evidence and the documents could not be admitted in evidence because of their diplomatic status. The Court not only decided to 'follow the opinion' in *Rex* v. *Rose*, but emphasized that the privilege is that of the Minister and can only be raised by him. Yet it is an interesting question whether the Court of Appeal was on sound ground in rejecting all possible situations in which a third person might raise the immunity of a foreign sovereign, his envoy, or his property. Indeed, cases concerned, for example, with maritime liens for salvage and damage claims between private parties may turn on the very question as to whether an 'immunity' from jurisdiction obtained either at the time of the action or at some other earlier and relevant time so as to prevent an action against that vessel.[3]

MAXWELL COHEN

THE COMMONWEALTH CONFERENCE, 1949

A MEETING of Commonwealth representatives was held in London from 21 to 27 April 1949 to consider the constitutional issues arising from (1) the decision of the Indian Constituent Assembly to adopt a republican form of government for India, and (2) the desire of the Government of India to continue India's membership of the Commonwealth.[4] The conclusions of the meeting were placed on record in the following declaration, which was presented to His Majesty the King by all the representatives on 27 April and published on 28 April:

> 'The Governments of the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon, whose countries are united as Members of the British Commonwealth of Nations and owe a common allegiance to the Crown, which is also the symbol of their free association, have considered the impending constitutional changes in India.
>
> 'The Government of India have informed the other Governments of the Commonwealth of the intention of the Indian people that under the new constitution which is

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[1] Cf. *Rex* v. *A.B.*, [1941] 1 K.B. 454.

[2] [1947] O.R. 201.

[3] *The Parlement Belge* (1880), 5 P.D. 197; *The Cristina*, [1938] A.C. 485.

[4] Those present at the meeting were:
United Kingdom: The Rt. Hon. C. R. Attlee (Prime Minister);
Canada: The Hon. L. B. Pearson (Secretary of State for External Affairs);
Australia: The Rt. Hon. J. B. Chifley (Prime Minister);
New Zealand: The Rt. Hon. Peter Fraser (Prime Minister);
South Africa: Dr. the Hon. D. F. Malan (Prime Minister);
India: Pandit Jawaharlal Nehru (Prime Minister);
Pakistan: The Hon. Liaquat Ali Khan (Prime Minister);
Ceylon: The Hon. D. S. Senanayake (Prime Minister).

about to be adopted India shall become a sovereign independent republic. The Government of India have however declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of The King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth.

'The Governments of the other countries of the Commonwealth, the basis of whose membership of the Commonwealth is not hereby changed, accept and recognise India's continuing membership in accordance with the terms of this declaration.

'Accordingly the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon hereby declare that they remain united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace, liberty, and progress.'

The Constituent Assembly was established for the whole of British India under the plan formulated by the Cabinet Mission in May 1946. The Muslim representatives, however, took no effective part in its deliberations, and under the plan of 3 January 1947, to which legal effect was given by the Indian Independence Act, 1947, British India was divided into the Dominions of India and Pakistan, each having its own Constituent Assembly. Meanwhile the Constituent Assembly had passed a resolution in January 1947 declaring that India should be a 'sovereign independent republic'. The Drafting Committee converted this phrase into 'sovereign democratic republic', adding that 'the question of the relationship between this democratic republic and the British Commonwealth of Nations remains to be decided subsequently'. No importance need be attached to this variation in language. The Draft Constitution, which was expected to be adopted in June 1949 and to come into operation in August 1949, was essentially republican in form. On the other hand, the Indian National Congress (the political party supporting the present Government of India and dominating the Constituent Assembly) had in December 1948 passed a long resolution approving of India's continued membership of the Commonwealth.

It appears that Pandit Nehru had raised this question informally with some of the Prime Ministers during the London discussions of October 1948. At that time the question was not ripe for decision. Further study was given to the problem in the United Kingdom and in India; in March 1949 the Parliamentary Under-Secretary of State for Commonwealth Relations visited India, Pakistan, and Ceylon, the Minister of State dealing with Commonwealth Affairs visited Australia and New Zealand, the Secretary to the Cabinet visited Canada, and the Permanent Under-Secretary of State for Commonwealth Relations visited South Africa. The meeting of April 1949 was arranged as a result of these discussions.

The functions which the King performs personally in respect of the independent members of the Commonwealth, other than the United Kingdom, are neither numerous nor important. He appears in the Constitution as a part of the legislatures and as the constitutional authority in whom executive powers are vested. These powers are, however, exercised on his behalf by the Governors-General under provisions in the Constitutions and by delegation in Letters Patent. He has not delegated to Governors-General powers relating to:

(*a*) The appointment of Governors-General; and
(*b*) Defence and external affairs, save in so far as a Governor-General may be commander-in-chief of the local forces.

The effect of the latter qualification is that the King and not the Governor-General declares war, makes peace, accredits and receives diplomatic and consular representatives, and makes treaties (i.e. confers full powers on delegates and authorizes ratification when necessary). All these powers are, however, exercised on the advice of the governments concerned. What is more, they tend to be even more formal than they are in the United Kingdom. The King keeps in very close touch with the Government of the United Kingdom, receives all the Cabinet documents, sees the Prime Minister frequently (usually once a week), discusses matters with other Ministers from time to time, and generally makes a close study, from a somewhat detached and therefore helpful point of view, of British politics and especially foreign policy. In the other independent countries of the Commonwealth these functions are performed, if at all, by the Governors-General. No doubt the King follows, with as close attention as is physically possible, the course of events in the Commonwealth countries; it is quite likely that he is more familiar with them even than the Secretary of State for Commonwealth Relations. Nevertheless, he is inevitably remote from events occurring outside the United Kingdom and he cannot, in the nature of things, exercise much influence upon them.

The difference may be seen by taking a single example. The making of a treaty between the United Kingdom and the United States requires the issue of formal documents under the King's sign manual (or personal signature). Long before these documents are presented for signature the King is aware of the course of events. The original proposal to open negotiations, the documents in which the alternative proposals are set out, the preliminary correspondence between the Foreign Office and the State Department, would all be submitted to him when they were submitted to the Cabinet. If he had views he would express them to the Prime Minister or the Foreign Secretary at this stage. After the full powers had been issued he would be in touch through the Foreign Office with the negotiations, and if there was insufficient information in the Cabinet documents he could ask for more. Again he would make his views known at this stage, and not when he was asked to sign a formal instrument of ratification. The fact that he has a formal power is really unimportant. He would never refuse to exercise it, but he would exercise his right to advise, encourage, and warn by some less formal means. What is more, he can exercise this right as easily where the instrument is an agreement between Governments (in which case no sign manual documents are required) as he can where a formal treaty in his name is proposed.

No such opportunities arise where another Commonwealth Government is concerned. He would see none of the correspondence between, say, the Canadian Ministry of External Affairs and the State Department. The Canadian Cabinet documents would not reach him. He would meet the Canadian Minister of External Affairs at rare intervals. When the full powers were presented by the High Commissioner he might hear of the proposal for the first time; and the High Commissioner, not being a member of the Cabinet, would be able to tell him little about the project. Bagehot's analysis of the King's functions—which, if anything, under-emphasized his influence in the United Kingdom—has no application to his functions in the Commonwealth countries.

It must not be inferred that the monarchy is unimportant in the Commonwealth. Its significance lies, however, not in the function of the King but in the psychological effect of having a common King. Experience has shown that it is possible to develop loyalty to an amorphous institution: the Republic, the Nation, the People, or the Flag can be a focus of loyalty. The problem in the Commonwealth is that there are two foci, the Nation and the Commonwealth. The King is in fact both, King of Canada and Head of the Commonwealth. Until 1948 no attempt was made to distinguish his two capacities, though the distinction was growing through the development of local citizenship. A Canadian national was a British subject, but a British subject was not necessarily a Canadian national. Thus, Canada contained three classes of persons: Canadian nationals who owed allegiance to the King of Canada; British subjects who owed allegiance to the King otherwise than as King of Canada; and foreigners who merely owed a local allegiance while in Canada. In the United Kingdom and in some other parts of the Commonwealth no such distinction was drawn until 1948, when by the British Nationality Act, 1948, and parallel legislation elsewhere, for the first time the arrangement was generalized. Even so, the distinction is still largely formal. So far as the general law is concerned the United Kingdom distinguishes a British subject from an alien and does not give special privileges to a United Kingdom citizen.

This confusion between the King as King and as Head of the Commonwealth has important psychological influences even where there is no traditional loyalty to the King personally. Such loyalty is generally to be found among people of United Kingdom stock or tradition. It has developed only partially among others, and where there have been long years of antagonism due to the frustration of nationalist aims, as in the Republic of Ireland and in India, it does not exist at all. One might guess that Australia and New Zealand would remain in the Commonwealth on sentimental grounds even if there were no more material advantages to be gained. The sentimental appeal would have progressively less weight in Canada, South Africa, Ceylon, Pakistan, India, and Ireland, in that order. There are, however, substantial material advantages, which can be obtained as easily by a republic as by a constitutional monarchy. They may be summarized as follows:

1. *Defence*. Except in the case of Ceylon, which preferred to have its obligations in writing, there are no formal obligations and, indeed, it would be difficult to formulate them. There is, however, a sort of understanding that the attitude of the members of the Commonwealth to each other would be something more than merely 'friendly' in the sense commonly attributed in international affairs.

2. *External affairs*. The system of communication from the United Kingdom to the rest of the Commonwealth enables the other members to keep themselves fully informed of and, if they feel so inclined, to influence, British foreign policy. India, or at least Pandit Nehru, emphasizes the importance of this factor.

3. *Economic advantages*. Trade within the Commonwealth is very important to all its members, partly because the economies of the United Kingdom and the other countries are in large measure complementary. There being competition outside, the consumers' preference and the custom rebates given to Commonwealth products are of great assistance. Further, the Commonwealth provides the greater part of the sterling *bloc* within which currency problems can be solved more easily through the pre-eminence and vast experience of the City of London.

4. *Professional and scientific advantages*. Most of the professions have qualifications which are recognized throughout the Commonwealth, so that students can move more easily, appointments can be obtained abroad, experts can be borrowed, advice can be sought. There are close relations between professional and scientific organizations. These advantages are cumulatively of great importance, particularly in the initial stage of independence when a great deal of advice and assistance is required at the official level and there is a shortage of trained personnel.

This summary gives a picture of the Commonwealth relationship, which cannot be adequately described by formal analysis because it is so essentially informal. There is nothing mysterious about it, though it does not fit into any formal classification because it has been the product of a slow evolution. It is part of the British tradition, in which the whole Commonwealth shares, to allow political institutions to be developed by precedents. Even when more precise formulation becomes necessary, as in the Balfour Declaration of 1926 or the Commonwealth Declaration of 1949, no attempt at complete and comprehensive formulation is made; decisions are taken on the essential points in controversy, but there is no exhaustive analysis of concepts and consequences. Political institutions are thus flexible and adaptable; and the Commonwealth is one of these institutions. It is not that the Commonwealth defies analysis; it is only that, as in the law courts, decisions are taken only on the points in issue with the result that the analysis must be built up, like the common law, by the inductive method.

India decided to become a republic not because any advantages are to be obtained thereby but because of a complex of emotions. In British India the Crown was closely associated with the Government of India. Independence from British rule is therefore thought to imply independence from allegiance to the Crown. There are, no doubt, other factors. On the one hand, monarchy in the Indian states has generally been associated with personal, arbitrary, and often irresponsible rule. On the other hand, republican ideas from the American and French revolutions and the socialist movement have had repercussions. The Indian Constitution provides for an elected President who is apparently intended to be a constitutional monarch without the trappings of monarchy. This is, perhaps, a somewhat hazardous experiment. Constitutional monarchy has been evolved in Great Britain by a long and at times stormy process of evolution. It is easy to translate this system through the appointment of a Governor-General, but it may be less easy where an elected President, presumably a politician of some ambition, assumes the royal functions. We have trained our kings, and Governors-General copy kings. There is some risk that a President will desire to set his own precedents and that the Council of Members will not always agree with him. Rather than accept allegiance to the former Emperor of India, the Constituent Assembly prefers to run the risk.

On the other hand, the material advantages of association with the Commonwealth have been realized and it has been thought desirable to remain within the Commonwealth at least for the time being. The fact that these material advantages are not dependent on allegiance to the Crown made a solution possible if the other members agreed that a continuation of India's membership was desirable. It is unlikely that there was in any country a very precise balancing of material advantages and disadvantages. The world is already too much divided politically to encourage the disruption of a standing relationship. Nor would the Commonwealth statesmen find it easy to explain to their peoples that they had refused to adapt the Commonwealth to meet India's request. What is more, there had been a republic within the Commonwealth for twelve years; for though under the Executive Authority (External Relations) Act, 1936, the King had continued to perform formal acts for Eire, the constitution of that country was essentially republican. India, too, was willing to meet the Commonwealth by a formula which required the least possible change. It was prepared to recognize the King as Head of the Commonwealth and to accept a situation in which the other Commonwealth nations continued formal allegiance.

It will be seen that the Declaration begins by stating the position obtaining before India became a republic. The eight countries 'owe a common allegiance to the Crown, which is also the symbol of their free association'. This is in fact a reformulation of the Balfour Declaration of 1926. Next, the Declaration mentions the proposed change in India, her desire to continue membership, and her acceptance of the King 'as the symbol of the free association of its independent nations and as such the Head of the

Commonwealth'. The other countries 'the basis of whose membership is not hereby changed', accept India's continuing membership. Accordingly the eight nations declare that they remain 'united as free and equal members of the Commonwealth of Nations', not necessarily in allegiance as to the Crown.

The implications of this new doctrine are not at first obvious, and in any case must be worked out by practice. It seems, however, that the following arrangements would follow:

1. In the United Kingdom and other countries of the Commonwealth India will be represented by High Commissioners, and these countries will continue to appoint High Commissioners in India.
2. Indian citizens will continue to be regarded as Commonwealth citizens (or British subjects) in other parts of the Commonwealth; and in India Commonwealth citizens will not be regarded as aliens.
3. The representatives of the Crown in foreign countries (whether in respect of the United Kingdom or of other parts of the Commonwealth) will continue to give protection to Indian citizens as Commonwealth citizens.
4. India will be treated by other parts of the Commonwealth as a Commonwealth country for the purposes of their customs laws; and India will continue to give reciprocal preferences to Commonwealth countries.

The effect on treaties containing most-favoured-nation clauses needs to be studied in relation to the text of each treaty. It should, however, be noted that the Commonwealth Declaration in itself changes no laws. India has power to change her laws and will exercise that power by enacting the new Constitution. On the other hand, such laws will not in themselves change the laws of the United Kingdom or of the other parts of the Commonwealth. For instance, many treaties made by the United Kingdom exclude the most-favoured-nation clause where preferences are given to countries which form part of 'His Majesty's dominions'. It is submitted that the meaning of this phrase must be ascertained from United Kingdom law. Though the point is not made clear in *Murray* v. *Parkes*,[1] it seems evident that a constitutional change effected under the Statute of Westminster, 1931, or the Indian Independence Act, 1947, does not in itself change United Kingdom law; and the fact that the secession of the Republic of Ireland required legislation by the United Kingdom (see Ireland Act, 1949) seems to confirm that United Kingdom law is not changed by unilateral legislation of a member of the Commonwealth. If this is so, a change in the status of India within the Commonwealth cannot in itself result in an extension of the meaning of the most-favoured-nation clause, i.e. the continuance of a preference to a republican India would not require the extension of that preference to other countries entitled to most-favoured-nation treatment unless there were some phrase in the treaty which showed that the clause was to be interpreted according to Indian law and not according to United Kingdom law. In that case, difficult questions would arise about the meaning of 'His Majesty's dominions', 'His Majesty's sovereignty', &c., but these questions are not raised by a mere change of Indian law which does not change United Kingdom law. If legislation is considered necessary in the United Kingdom—and off-hand it does not appear to be called for—it will be easy enough to provide that India shall cease to be part of His Majesty's dominions but shall be treated as if it were a part; such a formulation would be no more difficult than the provisions of the Ireland Act, 1949, to the effect that the Republic of Ireland shall not be part of His Majesty's dominions but shall not be a foreign country.

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[1] [1942] 2 K.B. 123.

If this is correct, the Commonwealth Declaration has no effect in international relations. The Commonwealth had ceased to be an international entity by 1939 because, though the rules laid down at the Imperial Conferences of 1923 and 1926 had enabled the British Empire to enter into treaties as a unit, it had not, in fact, done so. Its independent members had preferred to contract as separate entities. The Covenant of the League of Nations had distinguished Canada, Australia, New Zealand, and South Africa by placing them under the head of 'British Empire', and the United Kingdom was not mentioned at all. In the United Nations, on the other hand, the United Kingdom, Canada, Australia, New Zealand, South Africa, India, and Pakistan appear in the alphabetical order as separate countries—Ceylon being excluded by the veto of the Soviet Union. The Commonwealth is thus an organization or association of independent states, more closely associated than any other association of independent states, but acting through the states and not through the collective organization. Disputes between members of the Commonwealth are international disputes, as, indeed, India, Pakistan, and South Africa have already demonstrated.

W. Ivor Jennings

DECISIONS OF ENGLISH COURTS DURING 1947–8 INVOLVING POINTS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

1. The case of *Naim Molvan, owner of motor vessel 'Asya'* v. *Attorney-General for Palestine*, [1948] A.C. 351, raised questions concerning jurisdiction over foreigners and the doctrine of the freedom of the open sea.

The *Asya* was sighted by a British destroyer on the high seas some 100 miles south-west of Jaffa on 27 March 1946. She was flying no flag when first sighted but later hoisted a Turkish flag. The destroyer asked her destination by signal but she made no reply. A boarding-party was then sent from the destroyer and when it arrived the Turkish flag was hauled down and the Zionist flag hoisted. Charts on board indicated that the *Asya* was bound from France for Palestine. She was normally a freighter with little accommodation for passengers, but the hold had been fitted with tiers of bunks and there were 733 persons on board, none of whom had any passport or travel document or visa for Palestine. There was no passenger list or usual ship's papers. It was evident that the passengers intended, if possible, to effect an illegal landing in Palestine and the *Asya* was brought under escort to Haifa. She was not a Palestinian vessel, nor was her owner either a Palestinian citizen or a resident in Palestine.

The District Court of Haifa made an order confirming the forfeiture of the *Asya* to the Government of Palestine under the Immigration Ordinance, 1941, on the ground that 733 persons were on board within the territorial waters of Palestine, at Haifa, in circumstances in which the owner of the vessel was deemed to have abetted the unlawful immigration of those persons.[1] The Supreme Court of Palestine dismissed an appeal against the order of the District Court and the owner then appealed to the Privy Council.

The appeal to the Privy Council was based both on the interpretation of the legislation under which the order was made and on the validity of the legislation. In addition to contending, unsuccessfully, that the Immigration Ordinance was invalid as being repugnant to or inconsistent with the Mandate for Palestine, the appellant argued:

(*a*) that either the Ordinance must be so construed as not to touch the owner of a vessel who was neither a Palestinian citizen nor domiciled or resident in Palestine nor present in Palestine at any material time or, if such a construction were not admissible, then the Ordinance must *pro tanto* be regarded as *ultra vires* the legislative powers of the High Commissioner and invalid as violating a principle of international law, in that it made an act committed out of the jurisdiction by a foreigner abroad a criminal offence; and

(*b*) that the Ordinance must be so construed as not to empower the forfeiture of a vessel which, though in fact found within the territorial waters of Palestine with unlawful immigrants on board, had been brought there under compulsion by a British man-of-war after capture on the high seas but that, if the Ordinance was properly so construed, it was *ultra vires* the legislative power of the High Commissioner and invalid as infringing a principle of international law, in that it authorized the seizure of a non-Palestinian vessel on the high seas.

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[1] Section 12 (3) (as amended) of the Immigration Ordinance, 1941, provides *inter alia*:

'(3) (i) for the purposes of this subsection—

(*b*) . . . the master, owner and agent of a vessel . . . are all deemed to have abetted the unlawful immigration of any person (hereinafter called "that person") who is proved to have been on board the vessel . . . in Palestine or the territorial waters thereof, whether that person or the vessel came there voluntarily or not, unless it is proved—

(1) that that person etc.

(ii) if . . . any person is proved to have been on board a vessel . . . in circumstances in which the master, owner or agent of the vessel . . . is deemed to have abetted the unlawful immigration of that person then:

(*a*) the vessel . . . shall, save as hereinafter provided, be forfeited to the Government:'

For the purposes of the case before them and without deciding the point, their Lordships assumed that the High Commissioner was not empowered by Order in Council to make any law infringing any established principle of international law.

On the question of construction raised in (*a*) the Judicial Committee said:

> '. . . there is no room for limiting the meaning of the words "master, owner or agent", where they occur in this Ordinance, to persons who are either Palestinian citizens or resident in Palestine. It may be stated as a general rule of construction (though it is subject to some qualification) that, since, as it is sometimes phrased, "crime is local", a statute creating an offence and imposing a penalty for it should be so construed as to apply only to those persons who by virtue of residence or, in some cases, citizenship or nationality are regarded as subject to the jurisdiction of the State which has enacted the statute: see e.g. *Attorney-General* v. *Macleod*, [1891] A.C. 455. But in the present case it would largely stultify the purpose and effect of the Ordinance if, wherever the words "master, owner or agent" occur, they were so limited in meaning.'

In other words, there is a presumption against a statute which creates an offence applying to acts committed out of the jurisdiction by foreigners abroad but this presumption is rebutted if the statute expressly enacts or plainly implies to the contrary.[1]

As to whether any principle of international law is violated by an Ordinance which, in the circumstances in which this Ordinance was passed, penalizes, by the forfeiture of their property which is within the jurisdiction, persons of whatever nationality or wherever resident who abet or are deemed to abet an offence against its laws, their Lordships said that they had 'not been referred to any decision nor to any text book or authority, which suggests that the enactment by a State of a penalty so expedient, if not essential, for the purpose of preventing an unlawful invasion of its territory, is contrary to any established principle of international law'. They pointed out that the offence itself in this instance could only take place in Palestinian territory for it consisted in the unlawful entry into that territory, but it could be abetted by, and could hardly take place without the abetment of, persons outside the territory: moreover, so far as their own persons were concerned the abettors could not be punished so long as they remained outside the jurisdiction.

It is submitted that the result reached by their Lordships on this aspect of the case represents correctly the position under international law. Normally states do not exercise criminal jurisdiction in respect of acts committed by foreigners abroad. Nevertheless the exercise of such jurisdiction is by no means unknown in suitable cases and it cannot be said to be contrary to international law or practice. It is stated in the judgment of the Permanent Court of International Justice in the case of *The Lotus* that

> 'Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.'[2]

Their Lordships had no difficulty in reaching a conclusion in favour of the respondents on the question of construction raised by the appellant's argument (*b*). The relevant words in the Immigration Ordinance 'whether . . . the vessel came there [i.e. in the territorial waters of Palestine] voluntarily or not' clearly meant 'however it got there'.

On the question of validity raised in (*b*), their Lordships' view was that the question did not really arise because the Ordinance did *not* authorize the seizure of the *Asya* on the high seas. It prescribed her forfeiture to the Government of Palestine irrespective of how she came to be in Palestinian waters. However, even assuming that their construction of the Ordinance in this respect was incorrect, their Lordships considered that it was not established that the seizure of the *Asya* on the high seas and her compulsory direction to Palestine violated any international agreement or any rule of international law. The appellants invoked the doctrine called 'the freedom of the open sea' alleging that under that doctrine the *Asya* was entitled, whatever her mission might be, to sail the open sea off the coast of Palestine. Their Lordships did not assent to the proposition that any such right unqualified by place or circumstance is established by international law. They found that there is room for much discussion within what limits a state may, for the purpose of enforcing its revenue or police or sanitary laws, claim to exercise jurisdiction on the sea outside territorial waters.[1] They added that, even if there were common agreement on the subject, it is far from clear that it would be applicable to the case of a Mandatory Power carrying out a common policy, the execution of which had been entrusted to it by other Powers. Moreover, they said, freedom of the open sea, whatever that means, is in any case freedom of ships which fly, and are entitled to fly, the flag of a nation which is within the comity of nations. No question of comity or of breach of international law can arise if there is no state under whose flag the vessel sails. They quoted with approval the following passage from Oppenheim's *International Law* (6th ed., vol. i, p. 545): 'In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State.' The *Asya* which did not sail under the flag of another state could not claim the protection of any state nor could any state claim that any principle of international law had been broken by her seizure.

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[1] For the law relating to the construction of English statutes in this respect see Craies on *Statute Law*, 4th ed., pp. 393 ff.

[2] *P.C.I.J.*, Series A, No. 10 (1928), at p. 20.

The question whether a state may for revenue, police, sanitary, or fisheries purposes exercise jurisdiction over an area (contiguous zone) outside its territorial waters has, of course, in the past given rise to a great deal of discussion. Nevertheless the doctrine of the contiguous zone is one to which His Majesty's Government in the United Kingdom have long been resolutely opposed, and it is therefore unlikely that either the Government of the United Kingdom or the Government of Palestine would wish to justify the seizure of the *Asya* on the high seas on the basis of that doctrine. It is submitted that the true ground on which her seizure was justifiable as a matter of international law was that contained in the statement from Oppenheim which their Lordships approved.

2. *In re a Debtor* (1948), 64 T.L.R. 446, is another case concerning the application of legislation to a foreigner abroad. The Court of Appeal had to consider whether there was jurisdiction to grant leave to serve a petition in bankruptcy on the respondent, a Roumanian, out of the jurisdiction.

By Section 1(1) of the Bankruptcy Act, 1914, 'A debtor commits an act of bankruptcy . . . (*d*) if with intent to defeat or delay his creditors he . . . being out of England remains out of England. . . .' By Section 1(2) 'debtor' is defined for the purposes of this Act to include, unless the context otherwise implies, 'any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him . . . (*c*) was carrying on business in England, personally, or by means of an agent or manager'.

The respondent was assessed for excess profits tax in respect of profits of a business which he had carried on in England. He left for Eire on the day on which the General Commissioners confirmed the assessment. The business was later sold. The debt remained unpaid and the Crown sought leave to serve a petition in bankruptcy on the respondent out of the jurisdiction on the ground that he was a debtor within the meaning of Section 1(2)(*c*) of the Bankruptcy Act, 1914, and that he had committed an act of bankruptcy within the meaning of Section 1(1)(*d*) in that, having left England, he remained out of England for the purpose of defeating or delaying his creditors.

On behalf of the respondent, it was contended that he was not a debtor within the meaning of Section 1(2) and that, even if he was, he had not committed an act of bankruptcy within the meaning of Section 1(1). In support of these contentions, it was argued that an English statute must not be construed as applying to a foreigner, or to an act done by a foreigner, out of the jurisdiction unless the contrary is expressly provided, because so to legislate is contrary to the comity of nations. Consequently, notwithstanding the words 'whether a British subject or not' in Section 1(2), the section must be construed as if it contained a proviso to the effect that it was not applicable to an act done or suffered by a foreigner out of the jurisdiction. This argument was reinforced by reference to certain cases, namely *Ex parte Crispin* (1873), 8 Ch. App. 374, *Cook* v. *Charles A. Vogeler Company*, [1901] A.C. 102, and *In re Debtors*, [1936] Ch. 622, in which it was held, *inter alia*, that the word 'debtor' in the earlier Bankruptcy Acts (which did not, however, contain the words 'whether a British subject or not') must be construed in a limited sense as regards foreigners abroad.

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[1] See on this subject Lord Macmillan's judgment in *Croft* v. *Dunphy*, [1933] A.C. 156, at pp. 162–3 and Prof. Brierly's article in this *Year Book*, 14 (1933), p. 155.

Lord Greene said with reference to Section 1(1)(*d*) and Section 1(2)(*c*): 'It appears to me that, if these provisions are read in their ordinary common meaning in the English language, they clearly provide that with regard to the particular act of bankruptcy alleged, of being out of the jurisdiction and remaining out of the jurisdiction with intent to defeat creditors, the act can be committed by a person who is not a British subject.' Later in his judgment he added: 'Speaking for myself I see no ground for thinking that a jurisdiction over foreigners of the very limited kind which results from the application of the limitations in the bankruptcy law could in any way be construed as a violation of the comity of nations.'

Examining the cases referred to by the respondent, Lord Greene considered that in so far as they had the effect of limiting the meaning of the word 'debtor' in the earlier Bankruptcy Acts they did not apply to the 1914 Act and that for the purposes of the present law those decisions can be regarded as confined to the point that, where the act of bankruptcy alleged is that of a conveyance of property to trustees for the benefit of creditors generally, then it must be shown that the conveyance is one intended to operate according to the laws of England.

It was also argued for the respondent that he was not carrying on business in England within the meaning of Section 1(2)(*c*) of the Bankruptcy Act at the time of the alleged act of bankruptcy. Suffice it to say here that Lord Greene found against the respondent on this point, there being authority to the effect that a debtor is deemed to be still carrying on business in England, though he has as it were 'put up the shutters', so long as debts concerned with his business remain unpaid and in the instant case the excess profits tax due to the Crown remained unpaid.

Lord Justice Asquith and Lord Justice Evershed expressed similar views.

It was accordingly decided that there was jurisdiction to grant leave to serve the petition on the respondent out of the jurisdiction.

3. The exercise of jurisdiction over a person resident and domiciled abroad[1] was also in issue in *Forsyth* v. *Forsyth*, [1948] P. 125; [1947] 2 A.E.R. 623, in which the Court of Appeal reversed the decision of the Divisional Court ([1947] 1 A.E.R. 406) noted in the previous volume of this *Year Book*.[2] The Divisional Court had dismissed the appeal of a husband from an order made against him by the justices of the Petty Sessional Division of Edmonton for payment of 20*s*. a week maintenance to his wife on the ground of desertion.

The matter arose as follows. At the time of the marriage in 1943 the husband was in the army and the wife went to live with his family in Scotland. At the end of 1945, while on leave, he told his wife that owing to shortage of room in his parents' house he had decided that she should return to London until he was demobilized and that he would follow her in a few days. She returned to her parents' house in London but he did not

[1] Scotland, being beyond the area of jurisdiction of the English courts, is considered 'abroad' for this purpose.

[2] 24 (1947), pp. 425–6.

follow and she neither saw him again nor received any money from him. In July 1946 she took out a summons under Section 4 of the Summary Jurisdiction (Married Women) Act, 1895, before the justices in the Petty Sessional Division of Edmonton, where she was resident, alleging that her husband had deserted her. The summons was directed to her husband at his address in Scotland and was served on him under the Summary Jurisdiction (Process) Act, 1881. At the hearing before the justices the solicitor representing the husband objected to the jurisdiction on the ground that the husband was a domiciled Scotsman. The justices held that they had jurisdiction and that the complaint of desertion was proved. They made an order for maintenance of 20*s.* a week in favour of the wife. For the purposes of the appeal it was accepted by the Court of Appeal that the husband was ordinarily resident in Scotland and there was no evidence that he was ever in England.

It was argued for the husband that the residence in England of the husband as well as of the wife was a condition precedent to the exercise by the justices of their jurisdiction in this case. The main judgment of the Court of Appeal was given by Lord Justice Bucknill. He based his judgment on the principle stated by Lord Selborne L.C. in *Berkley* v. *Thompson* (1884), 10 App. Cas. 45, as follows:

> 'The general principle of law is *actor sequitur forum rei*; not only must there be a cause of action of which the tribunal can take cognizance but there must be a defendant subject to the jurisdiction of that tribunal, and a person resident abroad, still more, ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction, is *prima facie* not subject to the process of a foreign court . . . he must be found within the jurisdiction to be bound by it.'[1]

Confirming the Scottish case of *McQueen* v. *McQueen* (1920), 2 S.L.T. 405, Bucknill L.J. disagreed with the view of the Divisional Court that the combined effects of Section 4 of the Summary Jurisdiction Act, 1848, Section 4 of the Summary Jurisdiction (Married Women) Act, 1895, and Section 4 of the Summary Jurisdiction (Process) Act, 1881, comprised special legislation bringing the husband, although resident in Scotland, within the jurisdiction. In his judgment these provisions could not be construed to have this effect. Consequently, the husband being resident in Scotland, the justices had no jurisdiction over him. The learned Lord Justice was disposed to think that the mere presence of the husband within the jurisdiction at the time when the summons was issued would be sufficient to confer jurisdiction on the justices but, since there was no evidence that the husband in the case before him was ever in England, it was unnecessary to decide the point. The other two members of the Court of Appeal, Tucker L.J. and Cohen L.J., concurred in this judgment.

It was contended for the wife that, even if the husband was, in fact, domiciled and resident in Scotland, he had submitted to the jurisdiction of the justices by reason of the fact that his solicitor had appeared before them and cross-examined the wife, and that accordingly he could not now be heard to complain of lack of jurisdiction. Judgment on this point was pronounced by Tucker L.J. who applied the principle that, if a court of inferior jurisdiction in this country which derives its jurisdiction from statute lacks jurisdiction, parties cannot by agreement or otherwise confer jurisdiction on it. Cases in which it has been decided that the courts of this country will enforce a judgment of a foreign court of competent jurisdiction where the defendant has, by voluntarily appearing in the action, submitted to the jurisdiction of the foreign court have no application to courts of inferior jurisdiction in this country which derive their jurisdiction from statute. Tucker L.J.'s judgment on this point was concurred in by the other two members of the Court.

4. In *Lowenthal and others* v. *Attorney-General*, [1948] 1 A.E.R. 295; (1948), 64 T.L.R. 145, Romer J. confirmed and applied the decision of the Divisional Court in *R.* v. *Home Secretary, Ex parte L.*, [1945] 1 K.B. 7.

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[1] *Berkley* v. *Thompson* concerned an application for an affiliation summons. The proceedings were therefore, like the present case, *in personam.*

The earlier case concerned an application for a writ of habeas corpus to secure release from internment. The applicants were German nationals at the outbreak of the war but by virtue of a German decree of 1941 they were, as a matter of German municipal law, deprived of German nationality because they were Jews ordinarily resident outside Germany. They contended that by reason of the decree they had become stateless persons and were not therefore lawfully interned. The application was refused on the ground that the English courts will not recognize a change of nationality effected in war-time by the law of an enemy state purporting to change the status of an enemy alien to that of a stateless person, and therefore the applicants retained their enemy status notwithstanding the German decree.

In Lowenthal's case the action was for declarations that, by virtue of the German decree of 1941, two persons of the Jewish faith who were German nationals at the outbreak of the war and who were ordinarily resident in England at the date of the decree had been stateless persons since the date of the decree, and that a company of which they held between them the whole of the share capital had not, since the same date, been a company the business of which was managed, controlled, or carried on wholly or mainly for the benefit of subjects of a foreign state between which and His Majesty hostilities existed. The declarations were required to enable the plaintiffs to proceed with an application under Section 18 of the Patents and Designs Acts, 1907 to 1946, for an order extending a patent which belonged to them. Romer J. considered that the judgment of the Divisional Court in *R.* v. *Home Secretary*, *Ex parte L.*, concluded the matter against the plaintiffs. After quoting that judgment and finding no reason to depart from it, he said:

> 'I, accordingly, propose to apply the observations of the Lord Chief Justice in that case, and there are only two remarks which I should like to make. The first is that it would be a curious anomaly if, by reason of foreign legislation, an individual were, on grounds of enemy status, to be subject to some disqualifications regarding enemy aliens here but concurrently free from others. The second is that it is a reasonable conception that such disqualifications should be removed, if they are removed at all, by the Parliament of this country, and not by the government of a foreign state, and *a fortiori* a foreign hostile state. For these reasons it appears to me that I have no alternative but to dismiss the claim which the plaintiffs have brought founded on a change of nationality brought about by the decree of 1941.'

In a note in vol. 23 (1946) of this *Year Book*, Mr. J. E. S. Fawcett pointed out that the judgment in *R.* v. *Home Secretary*, *Ex parte L.*, implied that the applicants were to be regarded not only as enemy aliens but also as German nationals and that to purport to determine the national status of an alien by any rules of law other than those of the country of which he is deemed to be a national is contrary to all principles. He suggested that the Divisional Court should have determined the change of status of the applicant in accordance with German law but at the same time refusing to recognize upon grounds of public policy that such change of status had any consequence in English law. Romer J.'s judgment appears to confirm in its broadest terms the proposition in the earlier case that the English courts will not recognize a change of nationality effected in war-time by the law of an enemy state purporting to change the status of an enemy alien into that of a stateless person. This proposition would appear to be based on grounds of public policy. Whether or not there are good reasons of public policy for not recognizing a law such as the German decree for the purposes of Section 18 of the Patents and Designs Acts, and there is no consideration of the point in Lowenthal's case, it is respectfully questioned whether public policy requires that such a law should be refused recognition in England for all purposes. For instance, a woman of British nationality married to such a person, say in 1944, need not be regarded as having, under the nationality laws then in force, lost her nationality by marriage. It is submitted that it would be preferable in cases of this nature for the courts to give effect to the law of the enemy state in accordance with the usual principles governing the determination of nationality and to leave it to the legislature, whose proper function it is to make good deficiencies in the law, to extend, as it may consider desirable after due consideration of the merits in each instance, the disabilities of enemy aliens to persons deprived of their enemy nationality by the legislature of an enemy state.

5. There are two recent cases illustrating the rules of English law regarding the loss of a domicil of choice.

The first is *In re Lloyd Evans*, [1947] Ch. 695, in which the construction of a will and the validity of certain conditions contained in the will depended on the domicil of the testator at the date of his death, for if he were domiciled in Belgium certain dispositions in his will relating to his personal property might be invalid.

The testator was born in Wales in 1864, both his parents being British subjects who had resided in England all their lives. He left Europe in 1880 and lived in Java from 1880 to 1917, marrying there in 1888 a lady of Dutch nationality. In 1917 he left Java and, after residing in several countries including England and Holland for short periods, he eventually, in 1921, settled in Brussels. He remained there until 1940, acquiring a Belgian domicil of choice. On 10 May 1940 the Germans invaded Belgium and, reluctantly and under the pressure of circumstances, he was persuaded to leave Belgium and returned to England via the south of France. He died in London in 1944.

It was clear from the evidence that the testator had no intention of settling in England or indeed of remaining in this country any longer than he need. On the other hand, to some witnesses he had spoken of going to Australia in a manner which suggested that he intended to settle there and to another witness he had constantly expressed the hope of returning to Brussels. It was contended that he had lost his Belgian domicil of choice and that consequently his English domicil of origin had revived.

Wynn Parry J., following *Udny* v. *Udny* (1869), L.R. 1 Sc. and Div. 441, and *In re Marrett* (1887), 36 Ch. D. 400, stated the law as follows:

> 'The effect, in my view, of the authorities to which I have referred is that just as it is necessary for the purpose of acquiring a domicil of choice thus placing the domicil of origin in abeyance, to demonstrate the acquisition by unequivocal intention and act, so for the purpose of abandoning the domicil of choice it is essential to demonstrate that abandonment by unequivocal intention and act. The only real difference in law between the two cases of acquiring a domicil of choice and placing the domicil of origin in abeyance, on the one hand, and abandoning a domicil of choice, on the other hand, is that less evidence is required to establish the act of abandoning the domicil of choice than is required to demonstrate the acquisition of a domicil of choice.'[1]

On the evidence the learned Judge found that the testator's act in leaving Belgium was entirely equivocal so far as the question of abandonment of domicil of choice was concerned since he did not really have a free choice in the matter but left Belgium under pressure of circumstances. Nor did the evidence show an unequivocal intention to abandon the Belgian domicil of choice. The evidence at its highest showed no more than that from time to time the testator expressed different views as to his intention for the future to different people.[2] His domicil at the date of his death therefore remained Belgian.

The second case is *Zanelli* v. *Zanelli* (1948), 64 T.L.R. 556. A wife petitioned for dissolution of her marriage on the ground that her husband had deserted her. Mr. Commissioner Barton K.C. found that the husband had deserted his wife but held that he had no jurisdiction to grant her a decree since the husband (who had an Italian domicil of origin) (1) could never have acquired an English domicil of choice, his stay in England being only permissive, and (2) if he had acquired such a domicil of choice, he had abandoned it by the desertion. The wife appealed.

[1] At p. 707.

[2] 'I think probably the true view is that this old gentleman placed in these unfortunate, and, having regard to his age and associations, strange circumstances quite naturally during the last few years of his life was very often in two minds as to what he was going to do when the war came to an end. This is quite insufficient to establish an unequivocal intention to abandon his domicil of choice': at p. 708.

Section 13 of the Matrimonial Causes Act, 1937, provides that 'Where a wife has been deserted by her husband . . . and the husband was immediately before the desertion domiciled in England . . . the Court shall have jurisdiction notwithstanding that the husband has changed his domicil since the desertion'. The wife, therefore, had to satisfy the Court that her husband had an English domicil immediately before his desertion.

The facts briefly were as follows. The wife was a British subject of Italian descent. The husband was an Italian national by birth who carried on a business of selling in England wine and delicatessen which he purchased in Italy. They met in Italy in 1928. She returned to England. In 1929 he had also come to England and she agreed to marry him on condition that the matrimonial home should be in England. They were married that year in England where they then settled down. The husband returned to Italy for short periods from time to time partly on business and partly for family reasons, but, although he never became naturalized in England,[1] and as an alien could only remain in England under a temporary licence,[2] he always came back and in 1935 came back with capital and fresh belongings and showed every sign of intending to remain. In March 1935, without any warning, he left his wife and returned to Italy.

The Court of Appeal held first that Zanelli had acquired an English domicil of choice despite the fact that as an alien his stay was only permissive. Lord Du Parcq cited *Boldrini* v. *Boldrini*, [1932] P. 9 and said: 'A man can still have the intention of staying in a country and may acquire a domicil in it even though his stay is precarious in the sense that he may be turned out, and permissive in the sense that from time to time he has to ask for permission to stay.'[3]

Lord Du Parcq then referred to the following passage from Dicey's *Conflict of Laws*: 'A domicil of choice . . . is retained until both residence (*factum*) and intention to reside (*animus*) are in fact given up, but when once both these conditions have ceased to exist it is abandoned as well in law as in fact.'[4] He found that in the case before him only the *animus* existed immediately before the desertion and said: 'Having regard to what was decided and, I think, rightly decided in *In the Goods of Raffenel*,[5] I do not think that even when he stepped on board the ship which was to carry him to the continent, he had yet lost his domicil of choice.'

The wife's appeal was accordingly allowed.

6. In *Re Bischoffsheim, Cassel* v. *Grant and others*, [1948] 1 Ch. 79; [1947] 2 A.E.R. 830, Romer J. held that, where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicil of origin (i.e. the domicil of his parents at his birth) will be recognized by the English courts.

By his will B., who died in 1908, gave his residuary estate to his trustees on trust for sale and conversion and settled a share in the residuary trust fund on his granddaughter N. for life with remainder to her children. In 1908 N. married R.W. by whom she had two children, the first and second defendants. R.W. died in 1915 and in 1917 N. married his brother G.W. in New York. There was one child of that marriage, the third defendant R., who was born in 1920. The domicil of origin of both N. and G.W. was English and, by the law of England, marriage between them would have been void under the Marriage Act, 1835, but it was a valid marriage under the law of New York. They acquired a domicil of choice in New York before R.'s birth. N. died in 1946 and the question was whether R. was entitled to a beneficial interest in the testator's residuary trust fund as being a legitimate child of N.

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[1] He did, however, express the intention of becoming naturalized and in 1931 consulted a solicitor with that object.

[2] Under the Aliens Restrictions Act, 1914, and the orders and practice in force he had to get permission to stay in England. Apparently permission is given to stay for six months, though it is sometimes very readily extended and there was no suggestion that in Zanelli's case it would not have been extended.

[3] At p. 557.

[4] 5th ed. at p. 95.

[5] (1863), 3 S.W. and T.R. 49.

It was contended on behalf of R. that he was the legitimate child of N. on the ground that legitimacy is a question of status and that status is conferred or withheld, as the case may be, by the law of the domicil of origin, which is the law of the domicil of the parents at the time when the person whose legitimacy is in question was born. The status so conferred, it was argued, will be recognized and given effect to by the English courts, save only in cases when the person concerned claims to succeed to real estate in England. R.'s domicil of origin was New York and, according to the law of New York, he was legitimate.

On behalf of the first and second defendants it was contended that acceptance by English law of the status of legitimacy conferred by a foreign domicil of origin is subject to other exceptions besides that relating to real estate in England, including the exception, relied on by them, that an English court will not recognize as legitimate the child of a marriage which is incestuous or which is otherwise contrary to religion or sound morality.

Romer J. found authority for R.'s contention in *Re Goodman's Trusts* (1881), 17 Ch. D. 266, and in *Re Andros, Andros* v. *Andros* (1883), 24 Ch. D. 637. In *Re Goodman's Trusts* Cotton L.J. said:

> 'I am of the opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the status thus declared by the law of the domicil.'

In *Re Andros* Kay J. said:

> 'It must now be treated as settled that any person legitimate according to the law of the domicil of his father at his birth is legitimate everywhere within the range of international law for the purpose of succeeding to personal property. The well-known case of *Doe* v. *Vardill*, which introduced a distinction in this respect in the case of a person claiming to succeed as heir to real property in England by requiring such a person to establish his legitimacy according to English law—that is, as though the father had been domiciled in England at the time of the birth of the child—treats this as an exceptional case and recognises that the rule of succession to personal estate is otherwise, and this has been recently more expressly decided by the Court of Appeal in *Re Goodman's Trusts*.'

On the other hand, Romer J. found no authority for the further exception contended for by the first and second defendants. *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55, in which the legitimacy of the appellants for the purpose of deciding whether they could take under a bequest to 'children' in an English will was held to depend on the validity under English law of the parents' marriage, he distinguished on the ground of 'the very special circumstances' affecting that case.

It was recognized by the learned Judge that in *Shaw* v. *Gould*, as in the case before him, the status in question was that of original legitimacy, whereas *Re Goodman's Trusts* and *Re Andros* were cases of legitimation *per subsequens matrimonium*, but, in his judgment, there was no real distinction between the two classes of case.

He did not discuss the fact that *Re Goodman's Trusts* refers to the law of the parents' domicil and *Re Andros* refers to the law of the father's domicil. In the case before him the distinction was immaterial since, at the date of R.'s birth, both parents had acquired a domicil of choice in New York, but his silence on the point can presumably be taken as indicative of his agreement with the passages which he quoted from Kay J.'s judgment in *Re Andros*.

Bold as his disposal of *Shaw* v. *Gould* perhaps is, Romer J.'s judgment makes a welcome advance towards setting this branch of the law on a logical and sound basis.

7. In *de Reneville* v. *de Reneville*, [1948] P. 100; [1948] 1 A.E.R. 56; (1948), 64 T.L.R. 82, the Court of Appeal affirmed the decision of Jones J. ([1947] 2 A.E.R. 112) noted in the previous volume of this work. The judgment of Lord Greene in particular goes a long

way towards clarifying and rationalizing the rules concerning the jurisdiction of the English courts in nullity suits and the choice of law for determining whether a marriage is voidable or void.[1]

The husband and wife were married in Paris in 1935. The husband was a Frenchman domiciled in France and, except for a few months in England in 1938, resident in French territory since the marriage. The wife was an Englishwoman and was domiciled in England until the marriage. She resided with her husband until the outbreak of war in 1939 when she returned to England, leaving her husband in Biskra in Algeria. In April 1946 she went to Biskra as he was seriously ill and she stayed there for six weeks. She then returned to England and continued to live there apart from her husband. It was clear from the evidence that when she left her husband in 1940 she intended never to return to him.

The wife sought a decree of nullity against the husband on two alternative grounds, namely, incurable incapacity and wilful refusal to consummate the marriage. On an application by the husband it was ordered that a preliminary issue be tried to determine whether the court had jurisdiction to entertain the suit. Jones J. held that, on the grounds mentioned in the petition, the marriage was only voidable and not void, that therefore the wife had the same domicil as her husband and was not domiciled within the jurisdiction of the court, and that the husband having protested to the jurisdiction and there being no hardship or special circumstances involved in the case as in *White* v. *White*, [1937] P. 111, or *Hutter* v. *Hutter*, [1944] P. 95, the residence of the wife within the jurisdiction of the court was not enough to give the court jurisdiction. Against this decision the wife appealed.

Lord Greene's analysis of the relevant law may be summarized as follows:

(1) So far as English law is concerned, there is a clear distinction between void and voidable marriages.

(2) A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it; a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.

(3) If the marriage is voidable it must be regarded as having had the effect of giving to the wife, as a matter of law, the domicil of her husband and as precluding her from casting off that domicil before a decree of annulment is actually pronounced. If the marriage is void the wife does not acquire the domicil of her husband by operation of law: she is free to acquire it, to abandon it, or change it for a different domicil of choice.

(4) Whether a marriage is voidable or void is to be determined by the *lex loci celebrationis* if the ground for annulment concerns the observance of formalities, and by the law of the husband's domicil at the date of marriage or (preferably in Lord Greene's view) the law of the matrimonial domicil if the ground for annulment is a matter of essential validity as in the instant case.

(5) The courts of the country in which the parties are domiciled have jurisdiction to pronounce a decree of nullity whether the parties were or were not married in that country. This is set beyond doubt by the decision of the House of Lords in *Salvesen* v. *Austrian Property Administrator*, [1927] A.C. 641.

(6) The English domicil of the petitioner is sufficient to give the English courts jurisdiction in the case of a void marriage. This is the true explanation of *White* v. *White*. The reference in Bucknill J.'s judgment in that case to the fact that the petitioner was also resident in England was unnecessary, and the fact, to which

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[1] For an excellent discussion of the cases up to *Hutter* v. *Hutter*, [1944] P. 95, see the note in this *Year Book*, 22 (1945), pp. 279–85.

Bucknill J. attached importance, that the respondent had not objected to the jurisdiction was irrelevant. 'In the case before him the English domicil of the petitioner did in my opinion give the court jurisdiction whether or not the respondent objected.'[1]

(7) Residence of the petitioner alone in England is not sufficient to give the English courts jurisdiction. *White* v. *White* is not to be interpreted to the contrary. *Roberts* v. *Brennan*, [1907] P. 143, and *Hutter* v. *Hutter*, [1944] P. 95, cannot be accepted as authorities that residence of the petitioner alone is sufficient. *Robert* v. *Robert*, [1947] P. 164, was decided wrongly.

(8) Lord Greene expressed no opinion on the question whether residence of both parties within the jurisdiction of the English courts is sufficient to give those courts jurisdiction. Nor did he express any opinion on the question whether jurisdiction of the English courts can be founded on hardship or on the fact that the marriage took place in England.

Lord Greene found as a matter of fact that, if the wife in the case before him was competent to choose, i.e. if the marriage was void, she did abandon her French domicil (which he assumed she had acquired) and thereby resumed her domicil of origin which was English. Her domicil, therefore, was English on the hypothesis that the marriage was void and French on the hypothesis that it was voidable. The matrimonial domicil of the parties on the other hand was French. On this basis and on the basis of his analysis of the law, he reached the following conclusions on the question of whether the English court had jurisdiction based on domicil:

> '(i) If (contrary to my view) English municipal law applies as such [i.e. to the question whether the marriage is void or voidable] or if that law is applicable on the basis that French law is or must be deemed to be the same as English law, (*a*) the marriage was voidable only and not void whichever ground put forward for annulling the marriage be taken;[2] (*b*) the domicil of the wife was French at the date when the suit was instituted; (*c*) the domicil of the wife cannot be notionally regarded as other than French: it remains French until a decree of nullity is pronounced by a court of competent jurisdiction; (*d*) the only competent courts are the courts of France.
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> '(ii) If, as in my opinion is the case, the question whether the marriage is void or voidable is to be determined by reference to French law then (*a*) if by that law (as theoretically, at least, is possible) it is void on both grounds put forward, the English court has jurisdiction to pronounce a decree whichever of those grounds is established; (*b*) if by that law the marriage is void on one ground (for example, impotence) but voidable on the other (for example, wilful refusal) the English court has jurisdiction to pronounce a decree on the ground of impotence, but, if that is not established, it has no jurisdiction to pronounce a decree on the ground of wilful refusal; (*c*) if by French law the marriage is in both cases voidable and not void, the English court has no jurisdiction.'

On the question of whether the fact that the petitioner alone was resident in England was sufficient to found jurisdiction, Lord Greene agreed with Jones J. that it was not.

Bucknill L.J. agreed with Lord Greene that the question whether the marriage was void or voidable should be decided by French law. He said:

> 'I do not see any good reason why it should be decided by English law. True, the wife's domicil before marriage was English, but, on the other hand, her husband's domicil was French, and, the two parties to the marriage having different domicils, it seems to me that the law of France should prevail. To hold that the law of the country

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[1] This bears out the comments on *White* v. *White* made in the note in vol. 22 of this *Year Book* referred to above.

[2] See the judgment of Bucknill L.J. for a full consideration of the question whether according to English law incurable impotence renders a marriage void or voidable. He agrees with Lord Greene that it renders the marriage voidable only.

> where each spouse is domiciled before marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. For this reason I think it essential that the law of one country should prevail and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they, in fact, lived together should be regarded as the law which controls the validity of their marriage.'

He therefore chose French law as being both the *lex loci celebrationis* and the law of the matrimonial domicil. In the circumstances, he did not find it necessary to distinguish between matters of form and matters of essential validity as was done by the Master of the Rolls.

Assuming that under French law the marriage was void, Bucknill L.J. was of the opinion that the wife had not lost her English domicil unless she had done so in fact by making France her permanent home. In such a case he thought the English court should exercise jurisdiction. He added:

> 'The only other court, in cases of nullity *ab initio*, and where there is no common or matrimonial domicil in fact, seems to be the court of the country where the marriage was celebrated. But such a court might be extremely inconvenient to both parties, and, if neither party were domiciled or resident in the country, it is difficult to see what interest that country would have in his or her matrimonial status.'

By this he clearly did not mean that the court of the country where the marriage was celebrated does not have jurisdiction, but only that jurisdiction ought not to be limited to the courts of that country. It is to be noted that Bucknill L.J. apparently considered that the court of the matrimonial domicil has jurisdiction in the case of a void marriage.

If under French or English law the marriage was merely voidable, then, in the view of Bucknill L.J., the wife had the domicil of the husband by operation of law and the fact that the wife was domiciled within the jurisdiction before marriage and was resident within the jurisdiction at the time when the petition was filed was not sufficient to confer jurisdiction on the English court when the husband was domiciled and at all material times resident abroad.

Somervell L.J. associated himself with the judgment delivered by the Master of the Rolls.

The conclusion of the Court of Appeal therefore was that the English court would have jurisdiction to entertain the wife's suit if according to French law either of the two grounds for annulment alleged by the wife would make the marriage void. The latter point, which was fundamental, had not, however, thus far been raised in the issue and, having heard argument on the matter, the court came to the conclusion that to send the issue back at that stage to have the point decided would be inconvenient, unfair to the husband, and of a highly doubtful value to the wife. The appeal was, therefore, dismissed.

8. *Frankman* v. *Anglo-Prague Credit Bank* (*London Office*), [1948] 1 K.B. 730; [1948] 1 A.E.R. 337, raised, in the words of Cassels J., 'issues of importance concerning international currency and financial relationship'. It involved the principle that the English courts will not enforce a contract the performance of which would be unlawful by the *lex loci solutionis*.

Mrs. Frankman, the plaintiff's mother, was the owner of £300 debentures in a Czechoslovak company. These debentures were held by the Anglo-Prague Credit Bank, whose head office was in Prague, on her deposit account and were deposited with her knowledge by the Bank with their London branch. They were deposited in the Bank's name. The facts showed clearly that Mrs. Frankman had no direct dealings with the London office of the Bank. All her dealings were with the head office in Prague. The contract under which the Bank held the debentures on her deposit account was entered into in Czechoslovakia, the place of performance of the contract was Prague and the proper law of the contract was the law of Czechoslovakia.

The plaintiff, as administrator of his mother's estate, claimed from the London branch of the Bank the return, or the value, or damages for the detention, of the debentures. Though the writ was issued against the London branch, the branch was not a separate entity from the Bank. It was only against the Bank that the plaintiff could seek judgment and it was the Bank which in fact entered appearance as the defendant. The plaintiff's ownership of the debentures was undisputed but the defendants pleaded that they were unable to deliver them to the plaintiff by reason that, under the law of Czechoslovakia relating to foreign exchange, they could only do so with the permission of the National Bank of Czechoslovakia and this permission had been refused. They also maintained that the Bretton Woods Agreements Act, 1945, rendered the plaintiff's claim unenforceable.

In deciding against the plaintiff Cassels J. applied the rule which was considered in *Kleinwort Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. and Hungarian General Creditbank*, [1939] 2 K.B. 678, that a contract is unenforceable in the English courts if its performance would involve a breach of the law of the country where it is to be performed.[1] In the present case he found that the contract was to be performed in Prague, its performance was governed by Czechoslovak law and that law provided that it could not be performed without the permission of the National Bank of Czechoslovakia which had been refused. He distinguished *Wetherman* v. *London and Liverpool Bank of Commerce, Ltd.* (1914), 31 T.L.R. 20,[2] and referred to the United States case of *Kraus* v. *Zivnostenska Banka* (1946), 64 N.Y.S. 2d, 208.[3]

It was argued for the plaintiff that the English courts will not enforce the penal or revenue laws of other countries. Cassels J. agreed but took the view that the Czechoslovak law involved in this case did not come within these categories. He said 'These are financial restrictions and have to do with the financial position and internationally the financial relationship of Czechoslovakia', and he referred to the Bretton Woods Agreements under which the United Kingdom had agreed that 'Exchange contracts which involve the currency of any member of the International Monetary Fund and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member',[1] a provision which under the Bretton Woods Agreements Order in Council, 1946, had the force of law in the United Kingdom. Czechoslovakia is a member of the Fund.

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[1] Of Kleinwort's case Cassels J. said that it 'concerned a bill of exchange drawn by a Hungarian company and accepted by bankers carrying on business in London and the bills were payable in London. The Hungarian company wrote that they would only be in a position to provide cover at maturity if the exchange regulations prevailing in Hungary enabled them to do so. At the maturity date it was illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Government. It was held that the letter sent by the Hungarian bank was not part of the contract and did not limit the clear promise contained in the undertaking, that the proper law of the contract was English law and that, since the contract was to be performed in England, it was enforceable in the English courts, even though its performance might involve a breach by the defendants of the law of Hungary.'

[2] 'There the plaintiff caused his shares to be handed to the defendants to the order of a German bank, which German bank was supposed to transfer them to New York. Owing to the first world war breaking out, the German bank did not give the order to transfer. The plaintiff had no difficulty in getting a decision of SCRUTTON, J., in his favour. He said that the defendants could not say that they would not hand over the shares except by the authority of a third person. In this case there is no third party. The bailment was between Mrs. Frankman and the Prague bank.'

[3] 'There the plaintiff, before the last war, deposited in Prague with the defendants, a bank in Prague, money and securities. The plaintiff left Czechoslovakia before the war. I do not know whether he got to New York, but in September, 1940, hearing that the defendants had funds in New York, he instituted proceedings for money had and received and to recover the value of the securities. If he had succeeded he was going to execute against the defendants' funds in New York. He did not succeed because the contract, as here, provided that the place of performance was Prague and the law was Czechoslovakian. It is true that in that case the money and the securities were still in Prague. I do not think that makes any difference. In the case that I am considering the securities, though in London, are under the control of Prague.'

It is interesting to compare this case with *Kahler* v. *Midland Bank, Ltd.*, [1948] 1 A.E.R. 811, which came before the Court of Appeal less than two months later and which, factually, was a variation of the same theme but the decision of which proceeded on quite different lines.

The facts in Kahler's case were very complex but, for the purposes of this note, the material facts as found by the Court were as follows: Kahler was the owner of 800 shares in a Canadian company. These shares were held by the Midland Bank, Ltd., for the account of the B. Bank which was the agent or bailee of Kahler in regard to them. The B. Bank was a Czechoslovak banking company carrying on business exclusively in Czechoslovakia.

Kahler sought an order against the Midland Bank to hand over the shares to him. He based his claim (i) *ex contractu*, contending that the Midland Bank were directly accountable to him for the shares, and (ii) alternatively, *in rem* on the ground that he was absolutely entitled to the shares. The Midland Bank contended that there was no contract between them and the plaintiff because the B. Bank and not the plaintiff was their customer and they could not, consistently with the terms of their contract with the B. Bank or with proper banking practice, hand over the shares to the plaintiff except with the consent of the B. Bank which was unable to give its consent without infringing the Czechoslovak exchange control regulations. Macnaghten J. gave judgment for the plaintiff and the Midland Bank appealed.

On the facts the Court of Appeal came to the conclusion that there was no contractual relationship between the plaintiff and the defendants, and the plaintiff was not therefore entitled to succeed in his claim based on contract. They also found for the defendants as regards the claim *in rem*. The grounds for this part of the decision are not stated very clearly in any of the judgments but would seem to be as follows:

(1) Since the Midland Bank held the shares for the account of the B. Bank, the consent of the B. Bank was necessary for the delivery of the shares to anyone out of the custody of the Midland Bank.

(2) The B. Bank could not give consent without infringing the Czechoslovak exchange control regulations, unless they obtained (which they could not) the permission of the National Bank of Czechoslovakia to the transfer of the securities from their name to the plaintiff's name.

(3) The Court would not be justified in ordering the Midland Bank to hand over the shares without the B. Bank's consent or the permission of the National Bank of Czechoslovakia being obtained, since the plaintiff had from the first known that a transfer of the securities to his name would require such permission and his contract with the B. Bank had always been on that basis.

Evershed L.J. expressed the opinion that the mere recognition of the fact that the B. Bank could not consent to the transfer of the securities in the defendant's books from its own name into that of the plaintiff without a contravention of Czechoslovak law did not amount to the enforcement of the revenue laws of another country and, even assuming that the Czechoslovak laws in question could properly be described as revenue laws, there was no authority for the proposition that the English courts will not in any circumstances have regard to such laws.

Argument was addressed to the Court on the scope and effect of the Bretton Woods Agreements Order in Council, 1946, but on the view which the Court took of the case they considered it unnecessary for them to express any opinion on this argument.

9. In *Syal* v. *Heyward and another*, [1948] 2 A.E.R. 576, the Court of Appeal had to

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[1] Article VIII 2 (*b*) of the International Monetary Fund Agreement.

consider an application for the registration of a foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, to be set aside on the ground that the judgment had been obtained by fraud.

On 12 February 1947 Syal obtained a judgment against the defendants Heyward and David in an Indian court on a plaint in which he alleged that the defendants had borrowed 20,000 rupees from him and had executed a promissory note for that amount. The defendants, though aware of the suit against them and of the plaint, had not defended the action, but the Court of Appeal refrained from commenting on the adequacy of the reasons given by them for their absence and apparently regarded this as irrelevant to the issue before them. On 20 November 1947 the judgment of the Indian court was registered as a judgment of the King's Bench Division under Section 2(1) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933.

The defendants applied to the Master for an order for registration to be set aside pursuant to Section 4(1)(*a*)(iv) of the Act on the ground that the judgment had been obtained by fraud. They alleged that the plaintiff had deceived the foreign court by pretending that he had lent 20,000 rupees whereas in fact he had only lent 10,800 rupees, the difference being made up in part of commission and in part of interest which they alleged the plaintiff had insisted on being paid in advance. By this deception, they said, the plaintiff had concealed from the Indian Court the possibility that the defendants might have a defence under the Indian Usurious Loans Act.

The Master dismissed the application to set aside the registration of the judgment on the ground that the facts on which the defendants relied could have been raised by them in the Indian proceedings. On appeal by the defendants the judge directed the issue of fraud to be tried and the Court of Appeal upheld his decision on this point,[1] holding that the defendants had shown a prima facie case that the Indian Court had been deceived and that this entitled them to have the issue tried even though the Court might have to go into defences which could have been raised at the first trial.

The Court of Appeal based its decision on *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295, as explained in *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310, and, whatever the merits of these cases, there can be no doubt that the Court of Appeal's decision is fully covered by them, the only new element being the application to the enforcement of foreign judgments under the 1933 Act of principles previously considered only in relation to the enforcement of foreign judgments by action under the common law.

Dr. Martin Wolff has observed that 'the problem whether the vitiating influence of fraud prevails against the strength of *res judicata* has been discussed very often and in every country'.[2] On the one hand, *interest reipublicae ut sit finis litium* and a litigant ought not to be entitled to have the merits of his case retried by an action to set aside a judgment obtained in a former action except by way of appeal to a superior court. On the other hand, no one should be entitled to take advantage of his own wrongful act and a judgment ought not to be enforced if it was obtained by fraud.

It is well established that the unsuccessful party may bring an independent action to set aside the judgment of an English court on the ground that it has been obtained by fraud, but the fraud must have been discovered since the judgment complained of was given or the action will be stayed or dismissed as vexatious.[3]

In the *Duchess of Kingston's* case (1776), 2 S.L.C. 644, a distinction was drawn between those cases in which the court which gave the judgment impeached was mistaken and those in which it was misled. If the court was not actively misled but is simply alleged to have come to a wrong conclusion on the evidence before it, the matter will not be reopened. The aggrieved party has his remedy by appeal. In practice, however, there is not always a clear distinction between those cases in which a court has been mistaken and those in which it has been misled. A court is frequently mistaken because it has been misled and in such cases, where there is prima facie evidence of fraud, judges have found it difficult to refuse to reopen the matter.

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[1] The judge added the condition that the defendants paid into court the amount of the judgment debt but the Court of Appeal held that he had no power to impose the condition and in this respect varied his order.

[2] *Private International Law* (1945), p. 270.

[3] *Birch* v. *Birch*, [1902] P. 130, *Boswell* v. *Coaks* (No. 2) (1894), 86 L.T. 365.

In *Abouloff* v. *Oppenheimer* Lord Coleridge and Brett L.J. placed great emphasis on the principle that no one should be able to take advantage of his own wrongful act, and the Court were unanimously of the view that, in an action in England to enforce a foreign judgment, the defence can be raised that the foreign court was misled by the plaintiff's fraud even though the same charge of fraud and the same evidence in support of that charge were before the foreign court.[1] It was reasoned that this is not retrying the issue before the foreign court because the foreign court could never have had before it the issue whether it had been misled. It was admitted that this reasoning was only meeting technical argument by technical answer. If the reasoning is correct, it may well be doubted whether the distinction drawn in the *Duchess of Kingston's* case has much validity at all as regards foreign judgments. *Abouloff* v. *Oppenheimer* was approved and followed in *Vadala* v. *Lawes*.

As Professor Cheshire has pointed out,[2] these decisions make serious inroads into the healthy principle of *res judicata*. They encourage vexatious litigation by providing a way by which the unsuccessful litigant can have the merits of the case reconsidered otherwise than on appeal. The decision in *Syal* v. *Heyward* is not open to the same objection since in that case the burden of the defendants' complaint was that the Indian Court did not have before it the true facts. But it is open to the objection that it gives the unsuccessful litigant another bite at the cherry without requiring him first to show that he prosecuted his case with reasonable diligence in the foreign court. It is submitted with respect that it would have been more equitable to have applied a principle akin to that applied as regards English judgments and to have restricted the rule that judgments are impeachable for fraud to those cases in which the allegation of fraud is based on facts or evidence which through no fault of the unsuccessful party were not before the court which gave the original judgment.

W. V. J. EVANS

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[1] See Lord Coleridge at p. 302, Baggally L.J. at p. 304, and Brett L.J. at p. 306.

[2] *Private International Law*, 3rd ed., p. 816.

DOCUMENTARY SECTION
(THIRD YEAR)

CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

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A. *PERMANENT ORGANIZATIONS*[1]

I. *The Inter-Governmental Maritime Consultative Organization (I.M.C.O.)*

THERE was printed in this section of the *Year Book* for the year 1946 the constitution of the United Maritime Authority, together with some comment on the history of international organization in the sphere of marine transport.[2] As was there stated, the United Maritime Authority ceased to exist in March 1946, but its Executive Board in its final session made a number of recommendations for the continuance of international co-operation with control of merchant shipping and advocated, in particular, the setting up of a United Maritime Consultative Council. It was not suggested that this body should have any executive functions and it was intended that it should merely serve as a centre for the exchange of information upon which individual shipping policies might be the more effectively determined. This organization came into existence, but its life was limited to the period ending on 31 October 1946.[3]

Meanwhile the question of the creation of a permanent organization was taken up by the Temporary Transport and Communications Commission of the United Nations Economic and Social Council.[4] That Commission, though there were one or two dissenting voices within it which expressed the views that international organizations were becoming overly numerous and that shipping, being in many states in private hands, did not lend itself to intergovernmental regulation, reported back to the Council that 'a permanent official organization [was] required on the technical side of shipping regulations to tie together the technical shipping activities of governments'. Whilst making no recommendation 'concerning organization with respect to commercial shipping questions', the Commission pointed out that there were already considerable numbers of intergovernmental agreements touching technical marine questions and that a central organization was needed 'for the exchange of information, for determining where new conventions and revisions of old ones are required, and, most urgently for dealing on behalf of shipping, particularly with regard to safety matters, with organizations in other fields such as telecommunications and aviation'. The Commission further expressed the hope that the life of that highly qualified body, the United Maritime Consultative Committee, might be prolonged and recommended that it should be requested by the Economic and Social Council to consider and recommend 'what intergovernmental machinery should be developed in the shipping field so that the

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[1] For the scheme of arrangement of this section the reader is referred to this *Year Book*, 23 (1946), pp. 394–8.

[2] 23 (1946), p. 492. A valuable account of the history of international co-operation in the sphere of marine transport is contained in a memorandum submitted by the United States delegation to the Geneva Conference: United Nations Doc[ument], E/Conf.4/13.

[3] See the matter referred to in note 1 *supra*. See also *United Nations Economic and Social Council, Official Records*, First year, Second session, Annex 2, p. 167.

[4] Ibid., pp. 167, 173–4, 185, 187–9.

United Nations may institute the necessary negotiations under Article 59 of the Charter to bring about its establishment (unless it is believed that the U[nited] M[aritime] C[onsultative] C[ouncil] could transform itself into a specialized agency under Article 57'.[1] The Council, though again not without there being made some murmurs that specialized agencies were becoming very thick upon the scene, adopted and acted upon this Report.

Thus by Resolution No. 27, dated 21 June 1946, of the Economic and Social Council, 'the question of the establishment of a world-wide inter-governmental shipping organization to deal with technical matters' was referred for full examination to the Council's permanent Transport and Communications Commission set up by the same resolution, and the Secretary-General of the United Nations was instructed meanwhile to consult the United Maritime Consultative Council in the matter.[2] The latter body produced a draft constitution of such a permanent organization.[3] The newly created Commission felt that the work done by its temporary predecessor and the fact that the recommendations of the United Maritime Consultative Council 'represented the views of a highly competent body of maritime experts' rendered it unnecessary for it to go into the details of the matter itself. It was content, therefore, to recommend the creation of a permanent organization of the type envisaged and the convening of an international conference for this purpose. It noted, however, that the draft proposal of the United Maritime Consultative Council was not 'strictly limited to the technical field' and therefore proposed that that document should merely 'be utilized as a working draft to form the basis of discussion in such a conference' wherein every government represented would have full opportunity of expressing its point of view and of entering any reservations to the draft which it might have. And to the same end the Commission further recommended the circulation of the draft to governments and the invitation of their comments on it before the convening of the conference.[4]

In the debate on this report in the Economic and Social Council the view was again expressed that the further multiplication of specialized agencies was unnecessary and unduly expensive. The only alternative, apart from complete inaction, suggested in the instant matter was, however, that the task in contemplation should be entrusted to the International Trade Organization. It was, indeed, also recalled that the International Labour Office 'had dealt most successfully with non-commercial questions in the shipping sphere, such as conditions on board ship, safety measures for the crews, etc.', and the representative of the latter organization present at the Council table took occasion to indicate his belief 'in the possibility of close co-operation between the inter-governmental agencies' and his own organization.[5] This exchange is somewhat difficult to interpret. But the comment may be permitted that it is perhaps strange that the Council never considered the possibility of assigning functions touching shipping to one or other of the three specialized agencies exclusively concerned with communications and transport which were at that date already in existence. Instead, it adopted the suggestions of the Transport and Communications Commission in their entirety.[6]

Before passing to the conference, which was accordingly held in Geneva in February–March 1948, it is necessary to note one further action of the United Maritime Consultative Council. This was its adoption on 30 October 1946, the day before its official demise, in anticipation of the creation of the permanent body, of an agreement for the establishment of an interim organization, somewhat confusingly styled the Provisional Maritime Consultative Council.[7] This agency, the successor and not, as its name might be taken to imply, the forerunner, of the Consultative Council, came into existence on 23 April 1947, upon the deposit of the last requisite acceptance by a government, and will cease to exist 'upon the entry into force of a constitution for a permanent inter-Government maritime organization or if the membership falls below twelve'.[1] What its status is in the light of the resolution of the Geneva Conference setting up a Preparatory Committee of the new permanent organization also agreed to be established by that Conference is not too clear.[2] It is the more obscure since the Preparatory Committee both contains representatives of states which were not original members of the Provisional Council and does not include representatives of every such original member.[3]

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[1] *Official Records*, First year, Second session, pp. 173–4.

[2] Ibid., p. 395.

[3] This draft is printed as Annexe VII to the Report of the Transport and Communications Commission, as to which see the note following.

[4] *Official Records*, Second year, Fourth session, Supplement No. 8, pp. 8–10.

[5] Ibid., pp. 77–81.

[6] Ibid., p. 81.

[7] *Treaty Series*, No. 36 (1947); *United Nations Treaty Series*, vol. xi (1947), p. 107.

Delegations representing governments of thirty-two[4] states attended the Geneva Conference, amongst them delegations from non-members of the United Nations, notably Eire, Finland, Italy, and Switzerland. Observers attended on behalf of four other governments, including those of Iran and the Union of South Africa. The Union of Soviet Socialist Republics was not represented in any way. Observers also attended on behalf of the International Labour Office, the World Health Organization, the International Civil Aviation Organization, the International Telecommunications Union, and the International Meteorological Organization, as well as on behalf of various non-governmental organizations.[5]

Having before it the draft prepared by the United Maritime Consultative Council the Conference prepared and opened for signature and acceptance a Convention on the Inter-Governmental Maritime Consultative Organization (I.M.C.O.).[6] This contemplates an organization whose purpose is to be not only to provide machinery for co-operation among governments 'in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation', but also to encourage the removal and to provide for the consideration of discriminatory shipping practices. A subsidiary purpose of the Organization is to provide for the consideration of any matters concerning shipping that may be referred to it by 'any organ or specialized agency of the United Nations' (Art. 1). Its functions are, however, to be merely consultative and advisory (Art. 2). They are to consist, in general, in the consideration of and making of recommendations upon matters remitted to it by members or remitted or referred to it by any international agency, in the drafting of conventions and their recommendation for adoption, and in the devising of machinery for consultation and exchange of information among members (Art. 3). Where any matter appears capable of settlement 'through the normal processes of international shipping business' the Organization must so recommend, but where in its opinion or in the light of experience any matter respecting 'unfair restrictive practices by shipping concerns' appears incapable of solution in this way the Organization may consider it, provided that it shall first have been the subject of direct negotiations between members (Art. 4).

This statement of the purposes and functions of the Organization corresponds almost exactly to that contained in the draft of the United Maritime Consultative Council.[7] The only material differences in the final version are (1) the addition, Article 1 (*b*) of the proviso as to what forms of governmental stimulation of the shipping business shall not be deemed to be discriminatory, (2) the insertion of sub-paragraph (*c*) in the same article, placing 'unfair practices by shipping concerns' within the purview of the Organization, and (3) the consequential addition of Article 4. It cannot, therefore, be said that the scheme is unconsidered. But it must be admitted that it is confused in expression, if not also in conception. What, it may be asked, is the difference between the 'remission' (under Arts. 1 (*a*), (*b*), and (*c*) and 3 (*a*)) and the 'reference' (under Arts. 1 (*d*) and 3 (*a*)) of a matter to the Organization by any organ or specialized agency of the United Nations?

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[1] *United Nations Treaty Series*, vol. xi (1947), p. 107.

[2] *Final Act of the Conference*, Annex A; Misc. No. 6 (1948), Cmd. 7412; also published as *United Nations Publications*, 1948, viii. 2. The Main Working Party of the Geneva Conference evidently assumed that the Provisional Council would continue to exist. See U.N. Doc. E/Conf. 4/W.P. 1/S.R. 12, p. 10.

[3] Compare the Note to *Treaty Series*, No. 36 (1947), and para. 1 of Annex A to the *Final Act of the Conference*.

[4] The delegation of Panama withdrew from the Conference, protesting its 'systematic disavowal of [Panama's] maritime rights and interests'. See U.N. Doc. E/Conf. 4/29, dated 28 February 1948.

[5] *Final Act of the Conference*.

[6] The text of the Convention is published with the *Final Act of the Conference*.

[7] See p. 438, nn. 3 and 4, *supra*.

To put the objection somewhat more broadly, is not the business of the Organization of a highly mixed character and are not some at least of its functions perhaps incompatible with its composition and with its designation as an 'Intergovernmental' Organization? It may be recalled in this connexion that the original United Maritime Authority, of which the United Maritime Consultative Council was the residuary legatee, had as its exclusive function the effective allocation of United Nations shipping for immediate post-war purposes.[1] In view of the universality of state control of shipping at the time, that was a governmental function. Whether it may be termed also a 'technical function' depends on how the epithet 'technical' is to be interpreted. The situation was not different during the régime of the United Maritime Consultative Council, the aim then being to assist governments 'to frame their own policies in the post-U[nited] M[aritime] A[uthority] period in the light of the knowledge of the policies of other governments'.[2] The Transport and Communications Commission of the Economic and Social Council very properly observed, upon the draft scheme for a permanent organization prepared by the Consultative Council, that it was not 'strictly limited to the technical field'.[3] This comment must be understood to refer principally to the suggestion that the proposed organisation should have as one of its purposes the encouragement of 'the removal of all forms of discriminating action and unnecessary restrictions by governments affecting shipping'.[4] However, neither the assignment to the organization of that function nor yet that of 'the consideration . . . of any shipping problems of an international character involving matters of general principle that may be referred to the organisation by the United Nations'[5] impaired the appropriateness of the name 'Inter-Governmental Maritime Consultative Organization', which was also suggested by the Consultative Council. The latter's draft indeed emphasized the intergovernmental character of the projected body by its stipulation that 'Matters which are suitable for settlement through the normal processes of international shipping business are not within the scope of the organization'. This provision, though it is in a sense retained in Article 4, is very much watered down in the Geneva version. And the injection into the latter of the question of restrictive practices of (sc. private) 'shipping concerns',[6] despite the stipulation—again in Article 4—that the Organization shall not deal with it until it has become the concern of governments, tends to diminish still more that unity of function essential to the proper working of an international organization. I.M.C.O., it is apprehended, will be a hybrid. It is not exclusively a technical body, though it is to have custody of the important technical sphere of maritime safety.[7]

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[1] See this section of this *Year Book*, 22 (1946), pp. 491–2.

[2] *United Maritime Authority: Shipping Arrangements for a Limited Transitional Period after March 2nd, 1946*, presented to Parliament by the Minister of War Transport, March 1946, Cmd. 6754, quoted in this section of this *Year Book*, 23 (1946), p. 492.

[3] *Official Records*, Second year, Fourth session, Supplement No. 8, p. 9.

[4] Cf. Art. 1 (*b*) of the Constitution printed here, *infra*, p. 447.

[5] Cf. the somewhat amended version in Art. 1 (*d*) of the Constitution printed here, *infra*, p. 447. As to the text of the original draft, see p. 438, nn. 3 and 4, *supra*. Compare the constitution of the Provisional Maritime Consultative Council, loc. cit.

[6] See Art. 1 (*c*) of the Constitution printed here, *infra*, p. 447.

[7] See Part VII, Arts. 28–32, of the Constitution, *infra*, pp. 451–2.

In this connexion it is pertinent to refer back to the commentary which was offered in this section of the *Year Book* upon the constitution of the World Health Organization.[1] It was suggested in connexion with that institution that the simultaneous undertaking of the elaboration of its aims and of the drafting of its constitution had perhaps produced an inconsistency between the Organization's functions and the means with which it was endowed to perform them. Though it was assigned an aim infinitely more extensive than that of any previously established health organization, nothing less than the attainment 'by all peoples of the highest possible level of health', it was invested with little, if any, more power than its predecessors. A not dissimilar failure to consider the interaction of ends and means seems, at least in the earlier stages, to have pervaded the process of elaboration of the constitution of I.M.C.O. There was, it is apprehended, so insistent a concentration upon the creation of a new and independent institution that very little thought was given to what it should do. If the prime intention was to provide for the discharge in relation to shipping of functions akin to those of the so-called Technical Unions, such as the Universal Postal Union, in other spheres, then, surely, some attention should have been paid to the possibility and desirability of entrusting all such functions in the sphere of transport and communications to a single agency instead of adding yet one more to the four international organizations already existing within this sphere. If, on the other hand, the intention was to create an institution with broader responsibilities, of which the investigation and repression of discriminatory shipping practices may be taken as the type, then it seems no less clear that more attention should have been paid, first, to the suggestion that either the I.L.O. or the I.T.O. might efficiently add those responsibilities to those it already possesses, and, secondly, to the question whether the discharge of such functions simultaneously with lesser and more technical duties can conveniently be undertaken, and whether the machinery devised for the purpose is adequate.

As to the first of these matters, it is to be observed that the I.L.O. possesses a Joint Maritime Commission composed of shipowners and seafarers which since 1920 has been responsible for advising the Governing Body of the Organization on all maritime questions. The 1942 and 1945 sessions of this Commission in particular discussed many aspects of the question of safety of life at sea and the resolutions passed at those sessions were explicitly endorsed at the maritime session of the International Labour Conference itself, held at Seattle in 1946.[2] The Joint Maritime Commission in December 1947 adopted a resolution which, *inter alia*, reaffirmed 'faith in the I.L.O. for dealing with all questions within its competence affecting the conditions of life and employment of seafarers' and emphasized 'the importance of so framing the constitution of the I.M.C.O. as to eliminate any danger of overlapping between its work and functions and those of the I.L.O.'. This resolution was communicated to the Geneva Conference.[3] That conference also had its attention drawn to the proposed mandate[4] of the projected International Trade Organization in connexion with the repression of restrictive and discriminatory trade practices.[5] The question as to whether or not there was any need for a new international organization with non-technical functions in the field of shipping thus did not go entirely unconsidered at Geneva.

Had the conference for the revision of the Convention of 1929 concerning the safety of life at sea taken place before the Geneva Conference, as was expected, the second matter mentioned, the compatibility of the technical functions of I.M.C.O. with its non-technical duties, might have received more attention. Or, alternatively, the feasibility of entrusting duties connected with the Maritime Safety Convention to one or other of the existing technical organizations might have been explored. In this connexion it is to be noted that the scope and functions of the Maritime Safety Committee were suggested only tentatively in the draft[1] of the Consultative Council since they would 'be developed on the basis of the type of a draft convention emerging from the contemplated technical conferences'. The conferences referred to were that of the Preparatory Committee of Experts to Consider the Co-ordination of Activities in the Fields of Aviation, Shipping, and Telecommunications in Regard to Safety at Sea and in the Air, and the International Conference on Safety of Life at Sea. The former met in London in January and February 1948, and its conclusions were thus available to the Geneva Conference. They amounted, however, to no more than the recommendation of a high degree of co-ordination, based on mutual consultation and exchange of information, between I.C.A.O., I.M.C.O., the International Telecommunications Union, and the International Meteorological Organization, to be undertaken independently of the general co-ordination of the activities of specialized agencies which is the responsibility of the Economic and Social Council. The creation of I.M.C.O. was thus assumed to have been decided upon in this report,[2] as it was also in another document before the Geneva Conference, namely, a recommendation of the International Radio Conference of 1947 suggesting the affiliation of the International Code of Signals Committee with I.M.C.O. upon the creation of the latter.[3]

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[1] 24 (1947), pp. 450–1.

[2] See *United Nations Economic and Social Council, Official Records*, Second year, Fourth session, p. 83.

[3] See U.N. Doc. E/Conf. 4/7.

[4] See Arts. 18 and 50 of the draft Charter of the International Trade Organization.

[5] See U.N. Doc. E/Conf. 4/4, pp. 22–3.

If, however, the question of the necessity for a new organization was in any sense still open when the Geneva Conference met, its decision was effectively pre-judged by the method of work adopted by the conference. That consisted in the appointment of a Working Party to 'examine and report . . . on . . . the scope and purposes of *the organisation* [and] the main features of the constitution'.[4] When, therefore, the whole range of the work of its various subdivisions came to be surveyed finally, the conference naturally found itself committed to the endorsement of its own work.[5]

By way of postscript to this episode of constitutional history it may be said that the International Conference on Safety of Life at Sea did not meet until June 1948. It then revised generally the Safety Convention of 1929 and the Regulations for Preventing Collisions at Sea in force. The changes in the former which were effected, apart from such as are technical, are principally confined to the transfer of the Secretariat functions previously assigned to the Government of the United Kingdom to I.M.C.O. No alteration was made, for instance, in the arrangement whereby the International Ice Patrol is maintained by the United States Government, although the Maritime Safety Committee of I.M.C.O. is invited to study the existing scale of contributions by other governments to its upkeep.[6] There was also adopted, in the light of a communication from the Geneva Conference to the effect that the Report of the Preparatory Committee of Experts had been taken into account in deciding the composition and functions of the Maritime Safety Committee, a Recommendation respecting Co-ordination of Safety at Sea and in the Air going no further than to endorse that Report.[7]

What has been said above concerning the compatibility of the functions of I.M.C.O. with its denomination as an 'Intergovernmental' organization has, of course, no relation to the questions whether the 'intergovernmental' form of international organization is less satisfactory than the 'interstate', or whether there is in fact any difference between the two.[8] But, in connexion with these questions, it may be noted that, despite its name, the members of I.M.C.O. are to be 'states' and not 'governments' (Art. 5).[1] States which are members of the United Nations or which were invited to send representatives to the Geneva Conference have, subject to a qualification to be mentioned immediately, an absolute right to membership (Arts. 6, 7, and 57). It has been noted already that various non-members of the United Nations and two ex-enemy states were in fact represented at the Conference. In addition, any state not so entitled may become a member upon the recommendation of the Council endorsed by two-thirds of the total full membership of the Organization (Art. 8). And any territory or group of territories whose foreign relations are not in its or their own hands but in those of a state member may, in the complete discretion of the latter, become an associate member of the Organization. The like is the case with territories for whose international relations the United Nations may be responsible. But a prerequisite to the admission of any territory to associate membership is that the application of the convention containing the constitution of the Organization shall have been extended to it (Arts. 9 and 58). And there is an all-inclusive proviso that no state or territory may become or remain a member of the Organization contrary to a resolution of the General Assembly of the United Nations (Art. 11). This device is probably as satisfactory a link between membership of a specialized agency and membership of the United Nations as is to be found and is much to be preferred to the provisions in the constitutions of I.C.A.O.[2] and U.N.E.S.C.O.[3] Both membership and associate-membership may be terminated upon the giving of twelve months' notice not, however, to the Secretary-General of the Organization, but to the Secretary-General of the United Nations (Art. 59).

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[1] Loc. cit.

[2] *Report of the Preparatory Committee of Experts, &c.*, para. 21, U.N. Doc. E/CN.2/20/Add.1, presented to the Geneva Conference as E/Conf.4/8.

[3] See U.N. Doc. E/Conf. 4/4, p. 41.

[4] See *Summary Records of Plenary Meetings* (U.N. Doc. E/Conf.4/SR.Rev.), p. 30.

[5] See ibid., p. 93.

[6] See the *Final Act of the Conference*, Cmd. 7492 (1948).

[7] Recommendation No. 23, ibid. The Conference also adopted a *Recommendation* (No. 16) taking note of the concern of the I.L.O. with manning standards and advocating close liaison between that body and I.M.C.O. in regard thereto.

[8] See the discussion of this question in this section of this *Year Book*, 23 (1946), pp. 397–8.

The organs of the institution provided for in its constitution consist in an Assembly of all the members, meeting ordinarily every two years (Arts. 13 and 14), a Council of sixteen members meeting as often as may be necessary (Arts. 17–27), a Maritime Safety Committee of fourteen members elected for a four-year term, normally meeting annually and having primary concern with matters affecting safety at sea (Arts. 28–32), and a Secretariat, comprising a Secretary-General, a Secretary of the Maritime Committee and the necessary subordinate administrative staff (Arts. 33–8). The division of function between Assembly and Council is somewhat abnormal: the former is assigned certain only of the duties which usually devolve upon the plenary organ of an international institution, such as the voting of the budget and the recommendation to members of appropriate technical regulations (Art. 16), and is in effect dominated by the latter, which is, upon the instructions of the Assembly or, between sessions of the Assembly, upon its own initiative, to discharge the remainder of the Organization's duties save such as devolve on the Maritime Safety Committee (Arts. 16 and 22–7). The Maritime Safety Committee is also in a sense subordinated to the Council (Arts. 22 and 30).

The exact composition of the Council and of the Safety Committee is complicated. The former is to be made up of six governments of the nations with the largest interest in providing international shipping services, an equal number of governments of other nations with the largest interest in international sea-borne trade, and of two more governments elected by the Assembly from among governments having a 'substantial interest' in each of these two types of activity (Art. 17). The composition of the first Council, which body is to hold office from one regular session of the Assembly to the next, is laid down in an appendix to the constitution. Thereafter questions as to which nations have the 'largest interest' or a 'substantial interest' in providing international shipping services are to be decided by vote of a majority of the Council, including the concurring vote of a majority of the members represented on the Council by virtue of their possession of such interests. The Council is also to determine which are the nations with the 'largest interest' in international sea-borne trade (Arts. 17 and 18). But it is unspecified as to whether any special procedure is to be followed for the purpose, or how the existence of a 'substantial interest' in such trade is to be determined. But the sense of the conference seems to have been that the Assembly should make the necessary determination. Thus the United Kingdom delegate seems to have acquiesced in the Swiss objection that 'the Assembly would only be free to elect two members of the Council' save to the extent that he 'recalled that the Assembly would be free to elect two further members from a panel, to be determined by the Council, of several countries having a substantial interest in providing international shipping services'.[1] As to the Safety Committee, provision is made for the representation therein of members 'with an important interest in maritime safety'. This somewhat vague qualification is, perhaps fortunately, further elaborated, it being laid down that not less than eight of the fourteen members 'shall be the largest ship-owning nations' and that the remainder shall be elected 'so as to ensure adequate representation of members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed or unberthed passengers, and of major geographical areas' (Art. 28). Both of these provisions derive ultimately from the well-known arrangement for the representation of states of 'chief industrial importance' in the Governing Body of the I.L.O.[2] Though, in view of the division of function between the Assembly and the non-plenary organs of the institution, the device assumes in the constitution of I.M.C.O. a rather different significance. Its intent appears rather to be to weight the voting than to assure representation of appropriate interests in the lesser organs. In any event, it is not easy to see why the provisions actually adopted have to be so complicated in expression, nor why they should not have been made uniform with each other, if not left in the infinitely neater form recommended by the Consultative Council.

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[1] Compare, however, Art. 17.

[2] See the Convention on International Civil Aviation, signed at Chicago, December 1944, Art. 93, reproduced in this section of this *Year Book*, 23 (1946), p. 460.

[3] Constitution, Art. 11, reproduced in this section of this *Year Book*, 23 (1946), p. 425.

Subject to what has been said about the composition of the non-plenary organs of I.M.C.O., voting in the different organs of that institution is to be as follows: Each member has one vote, except that associate-members have no vote in the Assembly and are not eligible for membership of the Council or Safety Committee (Arts. 10 and 43). Decisions are to be by simple majority except where a two-thirds majority vote is specially provided for. A simple majority means a majority of members present and voting, i.e. 'present and casting an affirmative or negative vote'. A two-thirds majority, however, is defined as a 'two-thirds majority of those present' (Art. 43). This is a calculated antithesis, arising from the experience of the United Nations itself. The Charter[3] provides that majorities in the General Assembly and the Economic and Social and Trusteeship Councils shall ordinarily be calculated upon a reckoning of members present and voting. However, the Charter apparently contemplates the necessity of a (special) majority of votes *capable of being cast* for the adoption of any amendment to that instrument, or for the summoning of a conference for its revision.[4] Notwithstanding the seeming clarity of these stipulations, it was strongly argued during the course of the first session of the General Assembly that absence or abstention might prevent the securing of an (ordinary) majority in that body.[5] But Rule 78 of the Rules of Procedure adopted at that session now places the matter beyond doubt by a specific provision that a member abstaining shall be considered as not voting.[1] This rule has since become general in the practice of international organizations under the aegis of the United Nations.[2] Its explicit statement in the Constitution of I.M.C.O. is thus to be approved, though the circumstance that it does not apply where a special or two-thirds majority vote is required might perhaps have been more clearly expressed.

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[1] *Summary Records of Plenary Meetings*, p. 112.

[2] See this section of this *Year Book*, 24 (1947), p. 436.

[3] Arts. 18(2), 67(2), and 89(2). In so far as the unanimity rule was applied within the League of Nations the practice seems to have been the same: see Riches, *Majority Rule in International Organization* (1940), p. 23.

[4] Arts. 102 and 103. See Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents* (1946), p. 291.

[5] See *United Nations, Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings*, pp. 96–8. And see Spaak, *The Role of the General Assembly*, International Conciliation, 1948, No. 445, pp. 591, 602–4.

The Constitution of the Organization further includes various provisions which have now become common form in instruments of this type. Thus it is laid down that a member shall be invited to participate without vote in the deliberations of the Council upon any matter of particular concern to it (Art. 21); that the Secretary-General and his staff shall have an exclusively international loyalty (Art. 37); and that a member more than one year in arrears with its contributions shall have no vote in any organ of the institution unless the Assembly waives this provision (Art. 42). There are also the now usual stipulations concerning relationships with the United Nations and other international organizations (Arts. 26 and 45–9). As regards privileges and immunities, the General Convention on the Privileges and Immunities of the Specialized Agencies,[3] as modified to suit the Organization in accordance with its terms, is ultimately to apply (Arts. 50–1 and Appendix 11).

As regards the amendment of the Constitution it is provided that amendments shall be adopted by a two-thirds majority vote of the Assembly, including the concurring votes of the majority of the members of the Council. Any amendment so adopted is to come into force after a period of twelve months for all members save such as declare that they do not accept it. And any member not accepting an amendment ceases upon its coming into force to be a member of the Organization if at the time of the adoption of the amendment the Assembly shall by a two-thirds majority vote have decided that this should be the case (Art. 52). This article would appear to be an interesting new device for the solution of the very difficult problem of securing the necessary consents to the amendment of the constitutions of international organizations.

One last feature of this Constitution which may be remarked is the fact that it assigns various functions to the Secretary-General of the United Nations. As has been said already, it is to that official, and not to the Secretary-General of the Organization, that notification of withdrawal is to be made (Art. 59). The same is the case with notification of application of the Convention comprehending the Constitution to dependent territories (Art. 58). The Secretary-General of the United Nations is also the depository of instruments of amendment of the Constitution (Art. 53), and of acceptances or declarations of non-acceptance of such amendments (Art. 54). He is likewise the depository of instruments of acceptance of the Constitution itself (Art. 57), and is charged with the duty of informing all states represented at the Geneva Conference, and such other states as have or may have been members, of the date when each state becomes party to the constituent convention, and of the date when the latter comes into force (Art. 61). He is, of course, the custodian of the Convention itself (Art. 62) and the United Nations is authorized to effect its registration in accordance with Article 102 of the Charter as soon as it comes into force. These various duties of the Secretary-General of the United Nations appear to have accumulated because, it having been stipulated that that official should receive acceptances of the Convention comprehending the Constitution, it seemed, in the words of the Legal Adviser to the Conference, 'reasonable to prescribe' that he should be the depository also of acceptances of amendments to that Constitution.[1] The logic of this may be doubted since possession of apparently ministerial functions may in fact involve the making of quasi-legal decisions which, in so far as concerns an independent international organization, are more properly made by its own Secretariat than by an external authority. The matter referred to in the paragraph next following provides an instance of the sort of difficulty which may arise. There is, however, some convenience in such a provision as is contained in Article 63 of this Constitution as its effect is to relieve individual members of the United Nations from any duty of registration of the instrument in accordance with Article 102 of the Charter.[2]

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[1] Compare *Rules of Procedure of the Economic and Social Council*, Rule 40, and *Rules of Procedure of the Trusteeship Council*, Rule 37.

[2] Compare the Constitution of U.N.E.S.C.O., Art. IV(8) (this section of this *Year Book*, 23 (1946), p. 426), the Constitution of W.H.O., Art. 60 (ibid. 24 (1947), p. 460), the Constitution of I.R.O., Art. 12(2) (ibid. 24 (1947), p. 488), and the Constitution of I.L.O., Arts. 1(4), 6, 13(2), 17(2), 19(2), 21, and 36 (ibid. 24 (1947), pp. 434 ff.).

[3] It is hoped to publish in the next issue of this *Year Book* some commentary on, and possibly the text of, this instrument. The latter is meanwhile to be found in U.N. Doc. A/503, dated 20 November 1947.

The several articles investing the Secretary-General of the United Nations with duties in connexion with the Constitution of I.M.C.O. represent, no doubt, a very laudable attempt to implement the provisions of the Charter contemplating the bringing into relationship with the United Nations of the 'specialised agencies'. It may be wondered why the Geneva Conference, having made it, and having also adopted a draft agreement on the relationship between I.M.C.O. and the United Nations,[3] gave the appearance of gilding the lily by resolving upon the setting-up, in addition, of a Preparatory Committee of I.M.C.O.[4] It may also be permissible to speculate whether these elaborate arrangements for co-ordination are quite watertight. The Constitution, it is to be noted, or rather the constituent convention, is to enter into force on the date when twenty-one states, 'of which 7 shall each have a total tonnage of not less than 1 million gross tons of shipping', have become parties to it (Art. 60), and the Secretary-General of the United Nations, and not the Preparatory Committee, has, as has been seen, the duty of notifying that date (Art. 61). A somewhat similar provision was contained in the draft convention prepared by the United Maritime Consultative Council.[5] And very similar stipulations have crept into the Agreement for the establishment of the latter's successor, the Provisional Maritime Consultative Council,[6] and, more surprisingly, into the revised Maritime Safety Convention.[7] The difficulty which such provisions occasion is to know who is to determine whether the 'property qualification' has been satisfied in relation to any particular signatory or adherent. It is unlikely that parties will present audits of their merchant fleets in their instruments of acceptance.[8] No doubt the calculation is likely, in the normal course of events, to be a comparatively easy one. But the possibility of the marginal case certainly exists. The potential difficulty of the situation emerges clearly from the discussion at the Geneva Conference concerning the composition of the first Council of I.M.C.O. This is provided for in Appendix I to the Constitution, which names the states which are to be the first Council members. The list of names was so framed as to include those states which would have been members of the Council had the definitive procedure for its election been applied. However, the statistics of tonnage which were resorted to for the calculation of 'greatest interests' in shipping matters were those of the year 1938, a circumstance which provoked vigorous protests from some states whose merchant fleets have expanded considerably since that date.[9] It is suggested that even a government, acting as depository of acceptances of a treaty containing a provision of the sort alluded to, would be in a highly delicate position if it were to use a similarly obsolete scale for determining the 'property qualification'. Yet, in view of the action of the Geneva Conference in following the 1938 statistics, it might create a no less delicate situation to adopt any others. For the Secretary-General of the United Nations the position is perhaps even more invidious. It is difficult to see how the function of making the requisite calculation in whatsoever manner can be construed to be within that official's power, since his duty is merely to inform states of the date upon which the convention comes into force. Yet no other authority appears to be competent in the matter.

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[1] *Summary Records of Plenary Meetings*, p. 101.

[2] See *Regulations to give effect to Article 102 of the Charter*, adopted by the General Assembly on 14 December 1946, Art. 4(1), *United Nations Treaty Service*, vol. i, p. xxii. But compare Art. XIV of the International Maritime Safety Convention, 1947, which requires I.M.C.O. to effect the registration of that instrument with the Secretary-General of the United Nations.

[3] See the *Final Act of the Conference*. This agreement follows very closely the model of the agreements between the United Nations and the specialized agencies, as to the general features of which see this section of this *Year Book*, 23 (1946), pp. 404–6.

[4] See the *Final Act of the Conference*.

[5] Loc. cit.

[6] Art. V, loc. cit.

[7] Art. XI, loc. cit.

[8] The instruments of acceptance of the Convention so far deposited make no reference to the matter.

[9] *Summary Records of Plenary Meetings*, pp. 56–68.

CONVENTION ON THE INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION

The States parties to the present Convention hereby establish the Inter-Governmental Maritime Consultative Organization (hereinafter referred to as 'the Organization').

Part I. Purposes of the Organization

Article 1

The purposes of the Organization are:

(*a*) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation;

(*b*) To encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;

(*c*) To provide for the consideration by the Organization of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II;

(*d*) To provide for the consideration by the Organization of any matters concerning shipping that may be referred to it by any organ or specialized agency of the United Nations;

(*e*) To provide for the exchange of information among Governments on matters under consideration by the Organization.

Part II. Functions

Article 2

The functions of the Organization shall be consultative and advisory.

Article 3

In order to achieve the purposes set out in Part I, the functions of the Organization shall be:

(*a*) Subject to the provisions of article 4, to consider and make recommendations upon matters arising under article 1 (*a*), (*b*) and (*c*) that may be remitted to it by members, by any organ or specialized agency of the United Nations or by any other inter-governmental organization or upon matters referred to it under article 1 (*d*);

(*b*) To provide for the drafting of conventions, agreements, or other suitable instruments, and to recommend these to Governments and to inter-governmental organizations, and to convene such conferences as may be necessary;

(*c*) To provide machinery for consultation among members and the exchange of information among Governments.

Article 4

In those matters which appear to the Organization capable of settlement through the normal processes of international shipping business the Organization shall so recommend. When, in the opinion of the Organization, any matter concerning unfair restrictive practices by shipping concerns is incapable of settlement through the normal processes of international shipping business, or has in fact so proved, and provided it shall first have been the subject of direct negotiations between the Members concerned, the Organization shall, at the request of one of those Members, consider the matter.

PART III. MEMBERSHIP

Article 5

Membership in the Organization shall be open to all States, subject to the provisions of Part III.

Article 6

Members of the United Nations may become members of the Organization by becoming parties to the Convention in accordance with the provisions of article 57.

Article 7

States not members of the United Nations which have been invited to send representatives to the United Nations Maritime Conference convened in Geneva on 19 February 1948, may become members by becoming parties to the Convention in accordance with the provisions of article 57.

Article 8

Any State not entitled to become a member under article 6 or 7 may apply through the Secretary-General of the Organization to become a member and shall be admitted as a member upon its becoming a party to the Convention in accordance with the provisions of article 57 provided that, upon the recommendation of the Council, its application has been approved by two-thirds of the members other than associate members.

Article 9

Any Territory or group of Territories to which the Convention has been made applicable under article 58, by the member having responsibility for its international relations or by the United Nations, may become an associate member of the Organization by notification in writing given by such member or by the United Nations, as the case may be, to the Secretary-General of the United Nations.

Article 10

An associate member shall have the rights and obligations of a member under the Convention except that it shall not have the right to vote in the Assembly or be eligible for membership on the Council or on the Maritime Safety Committee and subject to this the word 'member' in the Convention shall be deemed to include associate member unless the context otherwise requires.

Article 11

No State or Territory may become or remain a member of the Organization contrary to a resolution of the General Assembly of the United Nations.

PART IV. ORGANS

Article 12

The Organization shall consist of an Assembly, a Council, a Maritime Safety Committee, and such subsidiary organs as the Organization may at any time consider necessary; and a Secretariat.

PART V. THE ASSEMBLY

Article 13

The Assembly shall consist of all the members.

Article 14

Regular sessions of the Assembly shall take place once every two years. Extraordinary sessions shall be convened after a notice of sixty days whenever one-third of the members give notice to the Secretary-General that they desire a session to be arranged, or at any time if deemed necessary by the Council, after a notice of sixty days.

Article 15

A majority of the members other than associate members shall constitute a quorum for the meetings of the Assembly.

Article 16

The functions of the Assembly shall be:

(*a*) To elect at each regular session from among its members, other than associate members, its President and two Vice-Presidents who shall hold office until the next regular session;

(*b*) To determine its own rules of procedure except as otherwise provided in the Convention;

(*c*) To establish any temporary or, upon recommendation of the Council, permanent subsidiary bodies it may consider to be necessary;

(*d*) To elect the members to be represented on the Council, as provided in article 17, and on the Maritime Safety Committee as provided in article 28;

(*e*) To receive and consider the reports of the Council, and to decide upon any question referred to it by the Council;

(*f*) To vote the budget and determine the financial arrangements of the Organization, in accordance with Part IX;

(*g*) To review the expenditures and approve the accounts of the Organization;

(*h*) To perform the functions of the Organization, provided that in matters relating to article 3 (*a*) and (*b*), the Assembly shall refer such matters to the Council for formulation by it of any recommendations or instruments thereon; provided further that any recommendations or instruments submitted to the Assembly by the Council and not accepted by the Assembly shall be referred back to the Council for further consideration with such observations as the Assembly may make;

(*i*) To recommend to members for adoption regulations concerning maritime safety, or amendments to such regulations, which have been referred to it by the Maritime Safety Committee through the Council;

(*j*) To refer to the Council for consideration or decision any matters within the scope of the Organization, except that the function of making recommendations under paragraph (*i*) of this article shall not be delegated.

PART VI. THE COUNCIL

Article 17

The Council shall consist of ~~sixteen~~ 18 members and shall be composed as follows:

(*a*) Six shall be Governments of the nations with the largest interest in providing international shipping services;

(*b*) Six shall be Governments of other nations with the largest interest in international seaborne trade;

(*c*) Two shall be elected by the Assembly from among the Governments of nations having a substantial interest in providing international shipping services, and

(*d*) Two shall be elected by the Assembly from among the Governments of nations having a substantial interest in international seaborne trade.

In accordance with the principles set forth in this article the first Council shall be constituted as provided in Appendix I to the present Convention.

Article 18

Except as provided in Appendix I to the present Convention, the Council shall determine for the purpose of article 17 (*a*), the members, Governments of nations with the largest interest in providing international shipping services, and shall also determine, for the purpose of article 17 (*c*), the members, Governments of nations having a substantial interest in providing such services. Such determinations shall be made by a majority vote of the Council including the concurring votes of a majority of the members represented on the Council under article 17 (*a*) and (*c*). The Council shall further determine for the purpose of article 17 (*b*), the members, Governments of nations with the largest interest in international seaborne trade. Each Council shall make these determinations at a reasonable time before each regular session of the Assembly.

Article 19

Members represented on the Council in accordance with article 17 shall hold office until the end of the next regular session of the Assembly. Members shall be eligible for re-election.

Article 20

(*a*) The Council shall elect its Chairman and adopt its own rules of procedure except as otherwise provided in the Convention.

(*b*) Twelve members of the Council shall constitute a quorum.

(*c*) The Council shall meet upon one month's notice as often as may be necessary for the efficient discharge of its duties upon the summons of its Chairman or upon request by not less than four of its members. It shall meet at such places as may be convenient.

Article 21

The Council shall invite any member to participate, without vote, in its deliberations on any matter of particular concern to that member.

Article 22

(*a*) The Council shall receive the recommendations and reports of the Maritime Safety Committee and shall transmit them to the Assembly and, when the Assembly is not in session, to the members for information, together with the comments and recommendations of the Council.

(*b*) Matters within the scope of article 29 shall be considered by the Council only after obtaining the views of the Maritime Safety Committee thereon.

Article 23

The Council, with the approval of the Assembly, shall appoint the Secretary-General. The Council shall also make provision for the appointment of such other personnel as may be necessary, and determine the terms and conditions of service of the Secretary-General and other personnel, which terms and conditions shall conform as far as possible with those of the United Nations and its specialized agencies.

Article 24

The Council shall make a report to the Assembly at each regular session on the work of the Organization since the previous regular session of the Assembly.

Article 25

The Council shall submit to the Assembly the budget estimates and the financial statements of the Organization, together with its comments and recommendations.

Article 26

The Council may enter into agreements or arrangements covering the relationship of the Organization with other organizations, as provided for in Part XII. Such agreements or arrangements shall be subject to approval by the Assembly.

Article 27

Between sessions of the Assembly, the Council shall perform all the functions of the Organization, except the function of making recommendations under article 16 (*i*).

PART VII. MARITIME SAFETY COMMITTEE

Article 28

(*a*) The Maritime Safety Committee shall consist of fourteen members elected by the Assembly from the members, Governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of members, Governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas.

(*b*) Members shall be elected for a term of four years and shall be eligible for re-election.

Article 29

(*a*) The Maritime Safety Committee shall have the duty of considering any matter within the scope of the Organization and concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigation, salvage and rescue, and any other matters affecting maritime safety.

(*b*) The Maritime Safety Committee shall provide machinery for performing any duties assigned to it by the Convention, or by the Assembly, or any duty within the scope of this article which may be assigned to it by any other inter-governmental instrument.

(*c*) Having regard to the provisions of Part XII, the Maritime Safety Committee shall have the duty of maintaining such close relationship with other inter-governmental bodies concerned with transport and communications as may further the object of the Organization in promoting maritime safety and facilitate the co-ordination of activities in the fields of shipping, aviation, telecommunications and meteorology with respect to safety and rescue.

Article 30

The Maritime Safety Committee, through the Council, shall:

(*a*) Submit to the Assembly at its regular sessions proposals made by members for safety regulations or for amendments to existing safety regulations, together with its comments or recommendations thereon;

(*b*) Report to the Assembly on the work of the Maritime Safety Committee since the previous regular session of the Assembly.

Article 31

The Maritime Safety Committee shall meet once a year and at other times upon request of any five of its members. It shall elect its officers once a year and shall adopt its own rules of procedure. A majority of its members shall constitute a quorum.

Article 32

The Maritime Safety Committee shall invite any member to participate, without vote, in its deliberations on any matter of particular concern to that member.

PART VIII. THE SECRETARIAT

Article 33

The Secretariat shall comprise the Secretary-General, a Secretary of the Maritime Safety Committee and such staff as the Organization may require. The Secretary-General shall be the chief administrative officer of the Organization, and shall, subject to the provisions of article 23, appoint the above-mentioned personnel.

Article 34

The Secretariat shall maintain all such records as may be necessary for the efficient discharge of the functions of the Organization and shall prepare, collect and circulate the papers, documents, agenda, minutes and information that may be required for the work of the Assembly, the Council, the Maritime Safety Committee, and such subsidiary organs as the Organization may establish.

Article 35

The Secretary-General shall prepare and submit to the Council the financial statements for each year and the budget estimates on a biennial basis, with the estimates for each year shown separately.

Article 36

The Secretary-General shall keep members informed with respect to the activities of the Organization. Each member may appoint one or more representatives for the purpose of communication with the Secretary-General.

Article 37

In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials. Each member on its part undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 38

The Secretary-General shall perform such other tasks as may be assigned to him by the Convention, the Assembly, the Council and the Maritime Safety Committee.

PART IX. FINANCES

Article 39

Each member shall bear the salary, travel and other expenses of its own delegation to the Assembly and of its representatives on the Council, the Maritime Safety Committee, other committees and subsidiary bodies.

Article 40

The Council shall consider the financial statements and budget estimates prepared by the Secretary-General and submit them to the Assembly with its comments and recommendations.

Article 41

(*a*) Subject to any agreement between the Organization and the United Nations, the Assembly shall review and approve the budget estimates.

(*b*) The Assembly shall apportion the expenses among the members in accordance with a scale to be fixed by it after consideration of the proposals of the Council thereon.

Article 42

Any member which fails to discharge its financial obligation to the Organization within one year from the date on which it is due, shall have no vote in the Assembly, the Council, or the Maritime Safety Committee unless the Assembly, at its discretion, waives this provision.

PART X. VOTING

Article 43

The following provisions shall apply to voting in the Assembly, the Council and the Maritime Safety Committee:

(*a*) Each member shall have one vote.

(*b*) Except as otherwise provided in the Convention or in any international agreement which confers functions on the Assembly, the Council, or the Maritime Safety Committee, decisions of these organs shall be by a majority vote of the members present and voting and, for decisions where a two-thirds majority vote is required, by a two-thirds majority vote of those present.

(*c*) For the purpose of the Convention, the phrase 'members present and voting' means 'members present and casting an affirmative or negative vote'. Members which abstain from voting shall be considered as not voting.

PART XI. HEADQUARTERS OF THE ORGANIZATION

Article 44

(*a*) The headquarters of the Organization shall be established in London.

(*b*) The Assembly may by a two-thirds majority vote change the site of the headquarters if necessary.

(*c*) The Assembly may hold sessions in any place other than the headquarters if the Council deems it necessary.

PART XII. RELATIONSHIP WITH THE UNITED NATIONS AND OTHER ORGANIZATIONS

Article 45

The Organization shall be brought into relationship with the United Nations in accordance with Article 57 of the Charter of the United Nations as the specialized agency in the field of shipping. This relationship shall be effected through an agreement with the United Nations under Article 63 of the Charter of the United Nations, which agreement shall be concluded as provided in article 26.

Article 46

The Organization shall co-operate with any specialized agency of the United Nations in matters which may be the common concern of the Organization and of such specialized agency, and shall consider such matters and act with respect to them in accord with such specialized agency.

Article 47

The Organization may, on matters within its scope, co-operate with other intergovernmental organizations which are not specialized agencies of the United Nations, but whose interests and activities are related to the purposes of the Organization.

Article 48

The Organization may, on matters within its scope, make suitable arrangements for consultation and co-operation with non-governmental international organizations.

Article 49

Subject to approval by a two-thirds majority vote of the Assembly, the Organization may take over from any other international organizations, governmental or non-governmental, such functions, resources and obligations within the scope of the Organization as may be transferred to the Organization by international agreements or by mutually acceptable arrangements entered into between competent authorities of the respective organizations. Similarly, the Organization may take over any administrative functions which are within its scope and which have been entrusted to a Government under the terms of any international instrument.

Part XIII. Legal Capacity, Privileges and Immunities

Article 50

The legal capacity, privileges and immunities to be accorded to, or in connexion with, the Organization, shall be derived from and governed by the General Convention on the Privileges and Immunities of the Specialized Agencies approved by the General Assembly of the United Nations on the 21st November, 1947, subject to such modifications as may be set forth in the final (or revised) text of the Annex approved by the Organization in accordance with sections 36 and 38 of the said General Convention.

Article 51

Pending its accession to the said General Convention in respect of the Organization, each member undertakes to apply the provisions of Appendix II to the present Convention.

Part XIV. Amendments

Article 52

Texts of proposed amendments to the Convention shall be communicated by the Secretary-General to members at least six months in advance of their consideration by the Assembly. Amendments shall be adopted by a two-thirds majority vote of the Assembly, including the concurring votes of a majority of the members represented on the Council. Twelve months after its acceptance by two-thirds of the members of the Organization, other than associate members, each amendment shall come into force for all members except those which, before it comes into force, make a declaration that they do not accept the amendment. The Assembly may by a two-thirds majority vote determine at the time of its adoption that an amendment is of such a nature that any member which has made such a declaration and which does not accept the amendment within a period of twelve months after the amendment comes into force shall, upon the expiration of this period, cease to be a party to the Convention.

Article 53

Any amendment adopted under article 52 shall be deposited with the Secretary-General of the United Nations, who will immediately forward a copy of the amendment to all members.

Article 54

A declaration or acceptance under article 52 shall be made by the communication of an instrument to the Secretary-General for deposit with the Secretary-General of the United Nations. The Secretary-General will notify members of the receipt of any such instrument and of the date when the amendment enters into force.

PART XV. INTERPRETATION

Article 55

Any question or dispute concerning the interpretation or application of the Convention shall be referred for settlement to the Assembly, or shall be settled in such other manner as the parties to the dispute agree. Nothing in this article shall preclude the Council or the Maritime Safety Committee from settling any such question or dispute that may arise during the exercise of their functions.

Article 56

Any legal question which cannot be settled as provided in article 55 shall be referred by the Organization to the International Court of Justice for an advisory opinion in accordance with Article 96 of the Charter of the United Nations.

PART XVI. MISCELLANEOUS PROVISIONS

Article 57. Signature and Acceptance

Subject to the provisions of Part III the present Convention shall remain open for signature or acceptance and States may become parties to the Convention by:

(*a*) Signature without reservation as to acceptance;
(*b*) Signature subject to acceptance followed by acceptance; or
(*c*) Acceptance.

Acceptance shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.

Article 58. Territories

(*a*) Members may make a declaration at any time that their participation in the Convention includes all or a group or a single one of the Territories for whose international relations they are responsible.

(*b*) The Convention does not apply to Territories for whose international relations members are responsible unless a declaration to that effect has been made on their behalf under the provisions of paragraph (*a*) of this article.

(*c*) A declaration made under paragraph (*a*) of this article shall be communicated to the Secretary-General of the United Nations and a copy of it will be forwarded by him to all States invited to the United Nations Maritime Conference and to such other States as may have become members.

(*d*) In cases where under a Trusteeship Agreement the United Nations is the administering authority, the United Nations may accept the Convention on behalf of one, several, or all of the Trust Territories in accordance with the procedure set forth in article 57.

Article 59. Withdrawal

(*a*) Any member may withdraw from the Organization by written notification given to the Secretary-General of the United Nations, who will immediately inform the other members and the Secretary-General of the Organization of such notification. Notification of withdrawal may be given at any time after the expiration of twelve months from the date on which the Convention has come into force. The withdrawal shall take effect upon the expiration of twelve months from the date on which such written notification is received by the Secretary-General of the United Nations.

(*b*) The application of the Convention to a Territory or group of Territories under article 58 may at any time be terminated by written notification given to the Secretary-General of the United Nations by the member responsible for its international relations or, in the case of a Trust Territory of which the United Nations is the administering authority, by the United Nations. The Secretary-General of the United Nations will immediately inform all members and the Secretary-General of the Organization of such notification. The notification shall take effect upon the expiration of twelve months from the date on which it is received by the Secretary-General of the United Nations.

PART XVII. ENTRY INTO FORCE

Article 60

The present Convention shall enter into force on the date when 21 States of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become parties to the Convention in accordance with article 57.

Article 61

The Secretary-General of the United Nations will inform all States invited to the United Nations Maritime Conference and such other States as may have become Members, of the date when each State becomes party to the Convention, and also of the date on which the Convention enters into force.

Article 62

The present Convention, of which the English, French and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who will transmit certified copies thereof to each of the States invited to the United Nations Maritime Conference and to such other States as may have become Members.

Article 63

The United Nations is authorized to effect registration of the Convention as soon as it comes into force.

APPENDIX I

(*Referred to in Article* 17)

COMPOSITION OF THE FIRST COUNCIL

In accordance with the principles set forth in article 17 the first Council shall be constituted as follows:

(*a*) The six members under article 17 (*a*) being

Greece
Netherlands
Norway
Sweden
United Kingdom
United States

(*b*) The six members under article 17 (*b*) being

Argentina
Australia
Belgium
Canada
France
India

(*c*) Two members to be elected by the Assembly under article 17 (*c*) from a panel nominated by the six members named in paragraph (*a*) of this Appendix.

(*d*) Two members elected by the Assembly under article 17 (*d*) from among the members having a substantial interest in international seaborne trade.

APPENDIX II

(*Referred to in Article* 51)

LEGAL CAPACITY, PRIVILEGES AND IMMUNITIES

The following provisions on legal capacity, privileges and immunities shall be applied by members to, or in connexion with, the Organization pending their accession to the

General Convention on Privileges and Immunities of Specialized Agencies in respect of the Organization.

Section 1. The Organization shall enjoy in the territory of each of its members such legal capacity as is necessary for the fulfilment of its purposes and the exercise of its functions.

Section 2. (*a*) The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes and the exercise of its functions.

(*b*) Representatives of members including alternates and advisers, and officials and employees of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

Section 3. In applying the provisions of sections 1 and 2 of this Appendix, the members shall take into account as far as possible the standard clauses of the General Convention on the Privileges and Immunities of the Specialized Agencies.

II. *The Universal Postal Union*[1] (*U.P.U.*)

It was suggested in this section of the *Year Book*[2] two years ago that it was fair to deduce that Article 57 of the Charter of the United Nations imposes no positive obligation upon either the United Nations or its members to effect or allow the 'bringing into relationship' with the latter of organizations of the type of the Universal Postal Union, whose responsibilities are 'wide' in not every sense of the word and which therefore does not come within the definition of 'specialized agencies' as organizations 'established by intergovernmental agreement and having wide international responsibilities . . . in economic, social, cultural, educational, health and related fields' contained in that article. But it was pointed out, on the other hand, that the Economic and Social Council was not debarred from negotiating to this end and that that body could negotiate at its discretion agreements for less formal co-operation with types of intergovernmental organizations other than 'specialized agencies'.

The Temporary Transport and Communications Commission of the Economic and Social Council reported in May 1946 to much the same effect. It is true that the Commission stated that the general plan of organization which it recommended would include 'specialized agencies, as defined in Article 57 of the Charter, in four fields of transport and communications, namely, aviation, shipping, telecommunications, and postal, such agencies to be of a world-wide character and to submit reports directly to the Economic and Social Council'. But, in regard to the Universal Postal Union, it was felt that 'since [it], as presently organized, appear[ed] to function to the satisfaction of the postal administrations which belong to the Organization, only such alterations should be made in the existing machinery as are necessary to bring it into a minimum relation with the United Nations'. More generally the Commission thought that 'the form of relationship of the United Nations with specialized agencies should not be uniform but would vary with the nature of the particular agency'. One particular difficulty which was pointed out was that 'The problem of negotiating with the Postal and Telecommunications Unions is complicated by the absence in both organizations of any permanent body with which to negotiate. In both cases the only competent body would be the periodic congress or general conference.' This, however, was not the only consideration which led the Commission to believe that it would be 'necessary for the machinery of the U[niversal] P[ostal] U[nion] to be somewhat altered to bring it into relationship with the United Nations'. Another was expressed as follows: 'Although heretofore specific inter-governmental agencies in the field of transport and communications dealing with security matters have existed only in war-time, the question now arises of permanent arrangements to implement decisions which may be taken by the Security Council to impose sanctions.' In conclusion the Commission observed that a Congress of the Postal Union was shortly to take place and suggested that draft proposals should be drawn up by postal experts under the auspices of the Economic and Social Council and submitted to the Members of the United Nations, all of which were members of the U.P.U., for their approval prior to the congress, 'ensuring the necessary action by the congress'.[1]

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[1] The best source of information concerning the constitution of the Universal Postal Union is the annotated edition of *Les Actes de l'Union, &c.*, published by the International Bureau. The latest edition appears to be that of 1946.

[2] 23 (1946), pp. 400–1.

In conformity with this recommendation a conference of 'postal experts' of states belonging to both the United Nations and the U.P.U. met at Lake Success in December 1946.[2] There were presented to this conference as a basis for its deliberations three documents, a draft agreement between the United Nations and the U.P.U. prepared by the Secretariat of the former, a similar draft agreement prepared by the United Kingdom Government in consultation with the French postal authorities, and a Secretariat draft of an amendment to Part 1 of the Universal Postal Convention[3] designed principally to endow the U.P.U. with a suitable permanent organ with which the United Nations might maintain relations. The conference took the view that the revision of the Convention was the exclusive concern of the Postal Union Congress and so did not consider the third of these papers. But the question of relationships with the United Nations was exhaustively discussed. Some delegates objected that, as the Temporary Transport and Communications Commission had reported, the U.P.U. functioned perfectly satisfactorily, and further that its linking to a political organization might prejudice its future usefulness. One rather interesting argument advanced in answer to this objection was that the Bureau of the Union had, during the war of 1939–45, improperly arrogated to itself a political function in that it had omitted from the list of members certain countries occupied by Germany and had added various satellites of Germany such as Slovakia and the General-Government of Bohemia and Moravia. The Secretariat drafts would have excluded any such controversy for the future since they contemplated the transmission of all applications for membership of the U.P.U. to the General Assembly of the United Nations and the acceptance of the recommendations of the latter thereon as binding. This result followed in a sense accidentally from the fact that the Secretariat draft agreement between the two organizations was based on the method already adopted in framing agreements between the United Nations on the one hand and U.N.E.S.C.O.[4] and I.C.A.O. on the other. The Franco–British draft contained no such provision, leaving the membership of the U.P.U. to be determined in accordance with the Postal Convention, which permitted sovereign states to join the Union by a process of mere notification of intention to the Swiss Government,[5] and non-sovereign entities to be brought within the application of the Convention by the making of a declaration on the part of the member responsible for their foreign relations.[6] The question of whether the U.P.U. should be brought into relationship in any sense with the United Nations having been decided by a majority in the affirmative, it was thought that it should enjoy the privileges attaching to the superior status of a

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[1] *First Report of the Temporary Transport and Communications Commission*, United Nations, *Journal of the Economic and Social Council*, First Year, No. 18, pp. 244, 251 ff.

[2] The documents of this conference, including the summary records of its proceedings, are contained in the United Nations documents series E/Conf./Post/P.C.1–21. The text of the draft agreement between the United Nations and the U.P.U. agreed upon by the conference also appears as U.N. Doc./E/253, dated 20 December 1946.

[3] The Convention then in force was that signed at the XIth Congress, held at Buenos Ayres in 1939, the text of which is available in *Les Actes de l'Union, &c.*, referred to on p. 457, n. 1, *supra*.

[4] See this section of this *Year Book*, 23 (1946), pp. 404–7.

[5] Art. 2. See p. 466, *infra*.

[6] Art. 9.

'specialized agency'. The Secretariat draft agreement was therefore preferred in the main to the Franco–British draft. But there was still some objection to the former. Thus it was thought that its provisions concerning the eventual development of a single unified international civil service were inappropriate, the staff of the U.P.U. being too small and too specialized to be integrated with that of other international organizations. Objection was also made to the stipulation contemplating the ultimate amalgamation of the headquarters of all international organizations, it being pointed out that the U.P.U. had been established in Berne for some seventy years. Some of these objections were overcome by the amalgamation of the two drafts before the Conference. On the question of membership of the U.P.U. a Franco–British proposal for compromise was adopted. This envisaged the retention of the liberty of every state to accede to the Postal Convention but stipulated that no new member should have a vote in the Congress if the General Assembly of the United Nations, which was to be kept informed of fresh accessions to the Union, should within one year recommend to the contrary.

The conference ultimately agreed upon a draft of an agreement between the U.P.U. and the United Nations.[1] There were, however, numerous abstentions when it came to voting upon this. The Scandinavian countries and the Netherlands protested in particular that, far from being a gathering of 'postal experts', the conference had a predominantly diplomatic complexion and was not properly qualified to discuss the affairs of an essentially technical body such as the U.P.U. The Swedish delegate pointed out in especial that, notwithstanding that the Conference had decided the question of revision of the Postal Convention to be the business of the Congress of the U.P.U., its own adoption of a draft agreement with the United Nations the implementation of which would necessitate modifications of the Convention could not fail to have a great, if not a decisive, influence on the Congress.

The Secretary-General, reporting the outcome of the Lake Success Conference to the Economic and Social Council, stated that it was desirable that the negotiation of the final agreement with the U.P.U. should take place during the Congress and suggested that the Council's Committee on Negotiations with Specialized Agencies should be instructed to this end.[2] By Resolution 35 (IV) of the Economic and Social Council, dated 28 March 1947, the Committee was authorized 'to enter into negotiations at the appropriate time with the Universal Postal Union for the purpose of bringing it into relationship with the United Nations. . . '.[3]

The scene then shifted to Paris, where the XIIth Universal Postal Congress, the first since 1939, met on 6 May 1947. Eight hundred and twenty-one proposals were submitted for discussion by members and the documents of the Congress fill three large volumes.[4] The summary records of the plenary sessions and the sessions of the commissions alone occupy over 1,100 pages.[5] This mass of material is a veritable mine of information on almost every aspect of the work of an international organization, but it is of course very difficult to summarize. An attempt is, however, made here to indicate the questions of major interest which occupied the attention of the Congress.

A question of some interest, considering the attitude of earlier Congresses in the matter,[6] was that of the admission of observers. The chief delegate of the United Kingdom, who had been president of the Lake Success conference, invited the United Nations and the (Provisional) International Civil Aviation Organization to send observers to Paris, and the United Kingdom proposed to the Congress that they should be admitted to its sessions. Twelve postal administrations supported this proposal, five opposed it, and the remainder expressed no opinion. The Danish delegation opposed the insertion in the rules of procedure of the Congress of a provision admitting them on the ground that the relationship of the U.P.U. to the United Nations was still an open question. However, the Congress adopted the proposal by a large majority.[1] But the International Chamber of Commerce and the International Air Transport Association were not permitted to send observers, the one being informed that the Congress would receive any memorandum it cared to submit, and the other that it would be advised to get into touch with I.C.A.O.[2]

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[1] See p. 458, n. 2, *supra.*

[2] *Official Records of the Economic and Social Council,* Second Year, Fourth Session, Annex 14, pp. 291, 292.

[3] *Resolutions adopted by the Economic and Social Council* during its Fourth Session, p. 10.

[4] Union Postale Universelle, *Documents du Congrès de Paris,* Berne, 1948.

[5] Ibid., vol. ii (*Procès-verbaux des séances plénières, &c.*).

[6] See this section of this *Year Book,* 23 (1946), pp. 401–2.

On the question of voting, a compromise proposal of the United Kingdom that the matter of relations with the United Nations should be decided by a two-thirds majority and all other matters by a simple majority was adopted.[3] It was resolved that in this context a majority meant a majority of delegations actually voting, abstentions being reckoned as negative votes.[4] The debate on relations with the United Nations, to which the special majority rule applied, was very long and occasionally heated. Despite the inquiry of the Swedish delegation whether the entry into any sort of relationship could have any practical value,[5] and the desire of India that the Union should steer clear of politics altogether,[6] sixty-eight delegations voted in favour of the principle that some sort of relationship with the United Nations should be established, Ireland (Eire), Sweden, the Vatican City,[7] and Roumania[8] alone abstaining. This decision was to some extent influenced by the argument advanced by some delegations, notably those of China[9] and Denmark,[10] that the Charter of the United Nations demanded it. As regards details, many pleas for the retention of the autonomy of the U.P.U. and of its essentially technical and apolitical character were advanced in the First Commission, wherein the vote referred to took place. Objection was taken, in particular, to the designation of the U.P.U. as a 'specialized agency', which might be taken to imply a position of inferiority. The United Nations observer stated to the Commission, however, that the U.P.U. could not be brought into relationship with the United Nations except as a specialized agency.[11]

The debate on the whole demonstrated the strong corporate spirit which develops in international institutions. Delegates frequently protested that they were an assemblage of 'postiers', having no political interests, that the United Nations was seeking to dictate to them, and that the linking of the U.P.U. to a political organization with an inevitably uncertain future might imperil its continuance. The strength and weakness of these arguments were strikingly illustrated by various problems concerning the membership of the Union which arose at the Congress. The French Government, which served as convener, abstained from inviting Spain to the Congress, having received a request from the Secretary-General of the United Nations that it should so abstain in view of the General Assembly's resolution of 12 December 1946[12] recommending that Members of the United Nations should restrict their relations with Spain. But on the other hand the French Government did invite the Governments of the Soviet Republics of Lithuania, Latvia, and Esthonia to send delegations, notwithstanding that the Government of the U.S.S.R. in 1940 had notified the incorporation of these states into the Soviet Union.[13] Despite the protest of some South-American states, which pointed out that the Pan-American Postal Union had concluded an agreement with Spain, and despite some doubts expressed by Switzerland and Ireland on the legality of the proceedings, the Congress approved the action taken by the convening Power in regard to Spain.[1] As to the Baltic States, the discussion of their position led at one point to an uproar, but ultimately it was decided that they were no longer members of the Union, in spite of the violent opposition of the U.S.S.R.[2]

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[1] *Procès-verbaux, &c.*, loc. cit., pp. 27–31.

[2] Ibid., pp. 43–6.

[3] Ibid., pp. 35–9.

[4] Ibid., pp. 61–7.

[5] Ibid., pp. 98–9.

[6] Ibid., p. 103.

[7] Ibid., pp. 104–5.

[8] See ibid., p. 210.

[9] Ibid., p. 100.

[10] Ibid., p. 104.

[11] Ibid., p. 200. This may be doubted: see the 'Observations on Relationships with Specialized Agencies' (of Committee 8 of the Executive Committee), para. 2, printed in the *Report of the Executive Committee to the Preparatory Commission of the United Nations*, London, H.M.S.O., 1945.

[12] *Resolutions adopted by the General Assembly*, during the Second Part of its First Session, p. 63.

[13] See *Les Actes de l'Union, &c.*, referred to in n. 1, p. 457, *supra*.

Had the Constitution of the Union been amended, as indeed the U.S.S.R. proposed, so as to confine its membership to sovereign states, or, as the Lake Success draft agreement demanded, so as to invest the General Assembly of the United Nations with a power of veto over the acquisition by new adherents to the Postal Convention of voting rights in the U.P.U., questions such as these would have been infinitely simplified for the future. But the Paris Congress did not adopt any proposal of this nature, nor did it effect, as was suggested both at Lake Success and during the Congress itself, the transfer of the diplomatic functions exercised by the Swiss Government under the Convention[3] to the Bureau of the Union. As a result, the draft agreement with the United Nations had to be modified somewhat.

This is not the place for a complete account of the negotiations with the United Nations which took place, and reference to them is relevant only to the extent[4] that they affected the question of the revision of the Postal Convention. But it is impossible to separate the two matters, which were essentially one, and it is therefore useful to record here that the negotiations referred to were completed during the Congress, the United Nations agreeing to yield on many points raised by the U.P.U. The final agreement, which was approved by the Economic and Social Council on 4 August 1947,[5] is a rather different instrument from that proposed by the Secretariat to the Lake Success conference. In particular, it contains no stipulation linking membership of the United Nations and the Union. But it does provide that the latter shall co-operate with, and give assistance to, the former and its organs 'so far as is consistent with the provisions of the Universal Postal Convention', and that 'in accordance with Article 103 of the Charter no provision in the Universal Postal Convention or related Agreements shall be construed as preventing or limiting any state in complying with its obligations to the United Nations'.[6] Thus there is, as it were, a victory for the United Nations in so far as concerns the compatibility of 'sanctions' with the Postal Convention. And, in view of the fact that the Paris Congress inserted in the Final Protocol of the Convention[7] a provision[8] that 'Spain, Morocco (Spanish Zone) and the whole of the Spanish Colonies [are] temporarily precluded from acceding to the Convention and the agreements in consequence of a decision of the XIIth Universal Postal Congress taken in conformity with a resolution of the General Assembly [until] that resolution is repealed or becomes objectless', the victory of the Union in the question of its exclusive right to control its membership is more apparent than real.

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[1] *Procès-verbaux, &c.*, pp. 252, 268. One argument adduced by the French delegation was that the words 'at the appropriate time' in the Resolution of the Economic and Social Council, quoted on p. 459, *supra*, were intended to indicate that negotiations for the bringing of the U.P.U. into relationship with the United Nations should not take place until Spain should have been excluded from the Union. This is a somewhat strained interpretation of the debate in the Council, as to which see *Official Records of the Economic and Social Council*, Second Year, Fourth Session, pp. 73–7.

[2] *Procès-verbaux, &c.*, pp. 1076–7.

[3] See now Arts. 3, 9, 13.

[4] It is hoped to print in this section of the *Year Book* next year a critical account of the agreements between the United Nations and the various specialized agencies, some aspects of which were discussed in this section of the *Year Book*, 23 (1946), pp. 404–6.

[5] See *Resolutions of the Economic and Social Council* adopted during its Fifth Session, pp. 56–60. where the text of the agreement is printed. The agreement is also contained in the Final Act of the Paris Congress; see *Documents du Congrès de Paris*, vol. iii, and see also Cmd. 7435.

[6] Art. VI.

[7] Contained in the Final Act of the Congress, loc. cit.

[8] Art. XVII (1).

But, if the acquisition by the Union of the status of a 'specialized agency' involved no radical revision of the Postal Convention in that regard, it did in another. For in the course of the negotiations with the United Nations the Union discovered for itself what the Temporary Transport and Communications Commission had already pointed out: that the Union possessed no permanent organ capable of maintaining any 'relations'.[1] There was no one who could sign or secure the observance of the proposed agreement and no formula for its revision[2] upon the giving of a period of notice could be effective for lack of anyone to give or receive such notice. There was, indeed, the International Bureau, but that possessed none but ministerial functions.[3] There had been in the past a preparatory commission charged with the preparation of the agenda of Congresses, but this no longer existed. Two proposals to create a permanent executive organ were made, that of the U.S.S.R. for an administrative council, and another, based on the original Franco-British suggestion to the Lake Success conference, for a permanent commission. The latter suggestion was adopted in preference to the former by the First Commission, and the Congress in Plenary Session worked out and adopted somewhat hastily the detailed provisions concerning the Executive and Liaison Commission which are now contained in Article 18 of the Convention.[4]

Amongst other important proposals before the Congress was one for the revision of the celebrated, but imperfect, scheme of contributions to the expenses of the Union. The Bureau prepared a paper on this subject which has a permanent value for the study of the finances of international organizations.[5] But it was resolved to maintain the *status quo*.[6] This is very unsatisfactory, as is shown by the circumstances revealed to the Congress, that the Swiss Government is constantly obliged to make advances to the Bureau and had in 1946 to lend it no less than a million and a quarter Swiss francs—a circumstance which, incidentally, imparted an element of embarrassment to the discussion of the suggestions that the Swiss Government should be relieved of its diplomatic functions under the Convention, that the Executive and Liaison Commission should have its headquarters elsewhere than in Berne, and that the latter should assume the supervision of the Bureau hitherto conducted by the Swiss Government.[7] There was also defeated, both in the First Commission[8] and subsequently (notwithstanding a change in the rules of procedure so as to make the majority requisite for the decision of questions relating either to relations with the United Nations or to Part I of the Convention one-half of two-thirds of the total of delegations)[9] in plenary session,[10] a proposal by the United Kingdom for the admission of colonies to associate-membership of the Union. Had this proposal been adopted, the United Kingdom would have supported the Mexican proposal, made at several successive congresses, for the abolition of the colonial vote provided for in Article 8 of the Convention. Proposals for the alteration of the rule that French is the exclusive language of the Union and its Congresses were likewise defeated.[11]

Turning now from the Paris Congress to the new Convention it prepared, it is to be remarked that the text of the latter, Part I of which, relating to the constitution of the U.P.U., is printed here, differs from that of the Buenos Ayres Convention of 1939 in only three important respects. In the first place, there now appears, naturally for the first time, a provision stipulating that 'The Union is brought into relationship with the United Nations . . .' (Art. 2). In the second place, the provisions regarding new accessions to the Convention, which were formerly to the effect merely that 'Any country is allowed at any time to adhere to the Convention' and that 'Adhesion must be notified diplomatically to the Government of the Swiss Confederation, and by the latter to the Governments of all the countries of the Union', have been elaborated. Whilst the process of accession remains the same so far as the formalities are concerned, a country is 'considered as having been admitted to membership' only 'if its request is approved by at least two-thirds of the countries which compose the Union', and an affirmative approval is requisite to this end (Art. 3). In connection with both the old and the new rules, it is to be noted that the Union interprets the word 'country' to mean a sovereign country. The Union is not, however, made up exclusively of sovereign states and has contained lesser entities virtually since its creation. This circumstance has had a somewhat different significance at different times. Broadly speaking, the original effect of the extension of the Union so as to include non-sovereign entities was merely to increase the vote of colonial powers, though it might well be that the colonial postal administrations of some countries were free to vote contrary to the wishes of their respective metropolitan administrations—as was certainly the case with India. With the creation of the League of Nations and the acquisition of original membership therein by the British Dominions and India, the membership of these countries in the U.P.U. of course acquired a character distinct from that of the membership of groups of colonies of different countries, including the United Kingdom. Indeed, the U.P.U. has been one of the principal instruments in the development of dominion status. But the overseas possessions of Britain alone have evolved to the point of full sovereignty. The result, the accidental case of Korea apart,[1] is that the colonial vote has remained a mere plural vote and that the United Kingdom, notwithstanding that its empire contains more than fifty separate postal administrations, some of very great importance, finds itself with only one extra vote compared with the French three and the Dutch and Portuguese two. The British proposal of associate-membership for colonies, coupled with the abolition of the colonial vote, would have remedied this inequality. But it would not, as would the U.S.S.R. proposal for the confinement of the Union to sovereign states, have altered the present situation wherein not only groups of colonies but also such entities as the Republic of San Marino are placed on an equality with sovereign states. The increase in the number of non-sovereign entities within the Union has not, however, been possible since the Cairo Congress of 1934 interpreted the word 'country' in what is now Article 3 of the Convention to mean a sovereign country.[2] But, whilst the political function of deciding what is a sovereign country has not been transferred, as was suggested at Paris, to the United Nations, the Swiss Government has been relieved of any responsibility in the matter. As the debate at Paris on the position of the Baltic States and of Spain indicated, however, the U.P.U. may in the future have cause to regret its arrogation to itself of this function, in the exercise of which, it is to be noted, the various privileged groups of colonies, the Vatican City and the Republic of San Marino have equal rights with the sovereign states.

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[1] See p. 457, *supra*.

[2] One very interesting question incidentally raised during the debate was whether an agreement between the United Nations and a specialized agency can be denounced by the latter. On this point the Congress adopted an 'Interpretation' to the effect that the term 'revision' (in the agreement with the United Nations) comprehended 'la possibilité de l'abrogation, car on peut reviser un accord à tel point qu'il n'en reste rien ou à peu près'. See *Procès-verbaux, &c.*, pp. 440, 1108.

[3] See the Convention, Art. 26.

[4] *Procès-verbaux, &c.*, pp. 950–5, 960–77, 1004–15, 1108–9.

[5] See ibid., pp. 122–33.

[6] Ibid., p. 135.

[7] Ibid., pp. 955–60, 978–97.

[8] Ibid., p. 294.

[9] Ibid., pp. 887 ff.

[10] Ibid., p. 1087.

[11] Ibid., p. 317.

The entry of the U.P.U. into the class of specialized agencies contemplated by Articles 57 and 63 of the Charter of the United Nations is undoubtedly a significant event in the history of international organization. It was perhaps inevitable that the United Nations should have sought to place that venerable body in the same position in relation to itself, particularly in so far as concerns the respective membership of the two institutions, as that in which the newer 'specialized agencies' stand.[1] It was equally inevitable that the U.P.U. should insist upon its 'autonomy'. But in regard to questions of membership, as the action of the Paris Congress in the matter of Spain indicates, this autonomy is more apparent than real. Politics cannot be dissociated from postal questions, as the contemplation by Article 41 of the Charter of what may be termed 'postal sanctions' against an aggressor state will demonstrate. Moreover, in view of the distinction between the rights of old members and of new applicants to join the Union which the Convention creates, even if an 'unpolitical' policy were to be followed in regard to new admissions, this would not be possible, as events have indeed shown, in regard to former or existing members such as the Baltic States. The compromise which the new text of Article 3 of the Convention, coupled with the omission from the agreement between the U.P.U. and the United Nations of any provision respecting membership of the former, effects, is thus, at best, an uneasy one.

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[1] Korea appears to have retained membership of the U.P.U. notwithstanding its absorption by Japan in 1908 although in the 1946 edition of *Les Actes de l'Union, &c.*, as to which see p. 457, n. 1, *supra*, its name does not appear in the Preamble. The Paris Congress resolved upon the *retention* of the name of Korea, along with Japan and Germany, in the Preamble. See *Procès-verbaux, &c.*, pp. 906–7, and see Final Act of the Congress, loc. cit., Art. XVII (2).

[2] See *Les Actes de l'Union, &c.*, pp. 3–4, nn. 4 and 5.

The third major change is the provision made, in Article 18, for the Executive and Liaison Commission. Though designed to 'ensure the continuity of the work of the . . . Union . . . in the interval between Congresses', this can hardly be described as a permanent body as it is to meet in regular session 'in principle once a year' only. Nor is it by any means a normal type of organ of an international institution. For in the first place it possesses the rare distinction that its members, who, incidentally, must be qualified postal officials, are[2] elected by the plenary organ of the Union, the Congress, on a basis of absolute equality. That is to say, there is no provision for the permanent representation in the Commission of certain states or areas and no state may be chosen to nominate its representative in it by three successive Congresses. It may be mentioned that Canada, which country was at the Paris Congress very much against the creation of the Commission, played a large part in the elaboration of these interesting rules for the composition of the Commission.[3] Secondly, the Commission has curiously restricted functions. It is not intended to play as large a part in the affairs of the U.P.U. as does, for instance, the Governing Body in the I.L.O. The provisions (paras. 7 and 8 of Art. 18) governing the extremely modest budget of the Commission, which are modelled on the financial regulations drawn up for the temporary Technical Trust Commission also set up by the Paris Congress,[4] are evidence of this. The Commission's functions are primarily those which, before its creation, the U.P.U. discovered in the course of its negotiations with the United Nations it could not perform, namely, the maintenance of contact with other international bodies. To this function of liaison have been added, however, certain others which may be termed executive. But the latter—in particular the maintenance of contact with members with a view to the improvement of the postal service, the examination of technical postal questions, and the examination of proposals made in accordance with the Convention—have been given to the Commission merely because it exists and not because of any real need. They did not go unperformed in the past or, if they did, this was unnoticed. The case is not different with the functions conferred on the Commission with respect to the International Bureau. The Bureau remains under the *haute surveillance* of the Swiss Government.[5] This is but a logical consequence of the retention by Switzerland of diplomatic functions under the Convention[6] and, as has been seen, was unavoidable so long as the financial system of the Union went unreformed.

The Executive and Liaison Commission is not inaptly named. Its nature and functions are adequately indicated by its title. It is primarily the central organ of the U.P.U. for the maintenance of relations with the United Nations. The internal central organs remain the International Bureau and the Swiss Government. This arrangement is not perhaps ideal, but clearly it is justified by practical and historical considerations.

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[1] Compare Art. 11 of the Constitution of I.M.C.O., *supra*, p. 448.

[2] For the present the Commission is represented by a provisional body. See *Procès-verbaux &c.*, p. 1109.

[3] See ibid., pp. 950–1015.

[4] Ibid., p. 1114.

[5] See Art. 26 (1) of the Convention.

[6] See Arts. 3, 9, 12, and 13.

The Universal Postal Convention being so well known, it is not considered necessary to give here any commentary upon those functions of it relating to the constitution of the U.P.U. which remain substantially unchanged. But it may be noted that the period allowed to postal administrations for the examination of proposals between Congresses has been reduced from six to two months (see Art. 22). Concerning Article 27, it may be mentioned that members are free to place themselves in classes contributing to the expenses of the Bureau higher than those in which they may have been placed upon entry into the Union. Thus at the Paris Congress Brazil announced its decision to enter the first class.[1] Finally, it may be mentioned that the Statute of the Bureau, that is to say its constituent instrument under Swiss law, was revised in 1947 to bring it into conformity with the new statute of the I.L.O. and that of the W.H.O., and that in its new form it endows the Bureau with somewhat more extensive privileges and immunities than the General Assembly's resolution of 13 February 1946 indicates as necessary for the specialized agencies.[2]

UNIVERSAL POSTAL CONVENTION

Concluded between Afghanistan, the Union of South Africa, the People's Republic of Albania, Germany,[3] the United States of America, the whole of the Possessions of the United States of America, the Kingdom of Saudi Arabia, the Argentine Republic, the Commonwealth of Australia, Austria, Belgium, the Colony of the Belgian Congo, the Byelorussian Soviet Socialist Republic, Bolivia, Brazil, the People's Republic of Bulgaria, Canada, Chile, China, the Republic of Colombia, Korea,[3] the Republic of Costa Rica, the Republic of Cuba, Denmark, the Dominican Republic, Egypt, the Republic of El Salvador, Ecuador, Spain,[3] the whole of the Spanish Colonies,[3] Ethiopia, Finland, France, Algeria, Indo-China, the whole of the other Overseas Territories of the French Republic and Territories administered as such, the United Kingdom of Great Britain and Northern Ireland, the whole of the British Overseas Territories, including the Colonies, Protectorates and Territories under Mandate or under Trusteeship exercised by the Government of the United Kingdom of Great Britain and Northern Ireland, Greece, Guatemala, the Republic of Haiti, the Republic of Honduras, Hungary, India, Iran, Iraq, Eire, the Republic of Iceland, Italy, Japan,[3] Lebanon, the Republic of Liberia, Luxembourg, Morocco (except the Spanish Zone), Morocco (Spanish Zone),[3] Mexico, Nicaragua, Norway, New Zealand, the Republic of Panama, Paraguay, the Netherlands, Curaçao and Surinam, the Dutch East Indies, Peru, the Republic of the Philippines, Poland, Portugal, the Portuguese Colonies in West Africa, the Portuguese Colonies in East Africa, Asia and Oceania, Roumania, the Republic of San Marino, Siam, Sweden, the Swiss Confederation, Syria, Czechoslovakia, the Hachemite Kingdom of Transjordan, Tunis, Turkey, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the Eastern Republic of Uruguay, the State of the City of the Vatican, the United States of Venezuela, Yemen and the Federal People's Republic of Yugoslavia.

The undersigned plenipotentiaries of the Governments of the above-named countries, being assembled in Congress at Paris, by virtue of Article 13 of the Universal Postal Convention concluded at Buenos Aires on the 23rd of May, 1939, have, by mutual consent and subject to ratification, revised the said Convention to read as follows:

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[1] *Procès-verbaux, &c.*, p. 1063. The original classification, adopted by the U.P.U. in 1874 and revised in 1878, was elaborated by the International Telegraphic Union in 1868 on the basis of the respective populations, length of telegraph wire, and numbers of telegraph offices of states. See *Les Actes de l'Union, &c.*, p. 40, n. 6. The classification, as applied in fact by the U.P.U., was the basis of the calculation of contributions to the expenses of the League of Nations until the amendment of Art. 6 (5) of the Covenant in 1924.

[2] *Procès-verbaux, &c.*, p. 118.

[3] See p. 461, n. 1, and p. 463, n. 1, *supra*.

PART I. UNIVERSAL POSTAL UNION

CHAPTER I. *Organisation and Extent of the Union*

Article 1. *Constitution and aim of the Union*

1. The countries between which the present Convention is concluded form, under the title of the Universal Postal Union, a single postal territory for the reciprocal exchange of correspondence.

2. The aim of the Union is to secure the organisation and improvement of the various international postal services, and to promote the development of international collaboration in this sphere.

Article 2. *Relationship with the United Nations*

The Union is brought into relationship with the United Nations in accordance with the terms of the Agreement[1] of which the text is annexed to the present Convention.

Article 3. *New accessions. Procedure*

1. Any sovereign country may at any time request to be allowed to adhere to the Convention.

2. The request is sent through the diplomatic channel to the Government of the Swiss Confederation, and by the latter to the members of the Union.

3. The country concerned is considered as having been admitted to membership if its request is approved by at least two-thirds of the countries which compose the Union.

4. Countries which, having been consulted, have not replied within a period of four months are considered as abstaining.

5. Admission to membership is notified by the Government of the Swiss Confederation to the Governments of all the countries of the Union.

Article 4. *Convention and Agreements of the Union*

1. The letter post is governed by the provisions of the Convention.

2. Other services, such as those relating to insured letters and boxes, postal parcels, cash on delivery, money orders, transfers to and from postal cheque accounts, collection of bills, drafts, etc., and subscriptions to newspapers and periodicals, form the subject of Agreements between countries of the Union. These Agreements are binding only upon the countries which have acceded to them.

3. Accession to one or more of these Agreements is notified in accordance with the provisions of Article 3, Para. 2.

Article 5. *Detailed Regulations*

The Postal Administrations of the Union Countries draw up, by mutual agreement, in the form of Detailed Regulations, the detailed rules necessary for the carrying out of the Convention and the Agreements.

Article 6. *Restricted Unions. Special Agreements*

1. Countries of the Union and, if their internal legislation does not forbid it, Administrations, may establish restricted Unions and make with one another special agreements concerning the matters dealt with in the Convention and its Detailed Regulations, provided that conditions less favourable to the public than those laid down by these Acts are not introduced.

2. The same right is accorded to the countries which participate in the Agreements, and if necessary to their Administration, as regards the matters dealt with by these Acts and their Detailed Regulations.

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[1] Omitted. See p. 461, n. 5, *supra*.

Article 7. *Internal Legislation*

The provisions of the Convention and of the Agreements of the Union do not override the legislation of any country as regards anything which is not expressly covered by these Acts.

Article 8. *Colonies, Protectorates, &c.*

The following are considered as forming a single country or Administration of the Union, as the case may be, within the meaning of the Convention or of the Agreements as regards, in particular, their right to vote at a Congress or Conference, and in the interval between meetings, as well as their contribution to the expenses of the International Bureau of the Universal Postal Union:

1. The whole of the Possessions of the United States of America, comprising Hawaii, Porto-Rico, Guam, and the Virgin Islands of the United States of America;
2. The Colony of the Belgian Congo;
3. The whole of the Spanish Colonies;
4. Algeria;
5. Indo-China;
6. The whole of the other Overseas Territories of the French Republic and Territories administered as such;
7. The whole of the British Overseas Territories, including the Colonies, Protectorates and Territories under Mandate or under Trusteeship exercised by the Government of the United Kingdom of Great Britain and Northern Ireland;
8. Curaçao and Surinam;
9. The Dutch East Indies;
10. The Portuguese Colonies in West Africa;
11. The Portuguese Colonies in East Africa, Asia and Oceania.

Article 9. *Application of the Convention to Colonies, Protectorates, &c.*

1. Any Contracting Party may declare, either at the time of signing, of ratifying, of acceding, or later, that its acceptance of the present Convention includes all its Colonies, overseas Territories, Protectorates or Territories under suzerainty or under mandate, or certain of them only. The declaration, unless made at the time of signing the Convention, must be addressed to the Government of the Swiss Confederation.

2. The Convention will apply only to the Colonies, overseas Territories, Protectorates or Territories under suzerainty or under mandate in the name of which declarations have been made in virtue of para. 1.

3. Any Contracting Party may, at any time, forward to the Government of the Swiss Confederation a notification of the withdrawal from the Convention of any Colony, overseas Territory, Protectorate, or Territory under suzerainty or under mandate in the name of which it has made a declaration in virtue of para. 1. This notification will take effect one year after the date of its receipt by the Government of the Swiss Confederation.

4. The Government of the Swiss Confederation will forward to all the Contracting Parties a copy of each declaration or notification received in virtue of paras. 1 to 3.

5. The provisions of this Article do not apply to any Colony, overseas Territory, Protectorate or Territory under suzerainty or under mandate which is mentioned in the preamble of the Convention.

Article 10. *Extent of the Union*

The following are considered as belonging to the Universal Postal Union:

(*a*) post offices established by Union countries in territories not included in the Union;

(*b*) other territories which, although not members of the Union, are included in it as being subordinate, postally, to a country of the Union.

Article 11. *Exceptional Relations*

Administrations which provide a service with territories not included in the Union are required to act as the intermediaries of the other Administrations. The provisions of the Convention and its Detailed Regulations apply to these exceptional relations.

Article 12. *Arbitration*

1. In case of disagreement between two or more members of the Union as to the interpretation of the Convention and the Agreements as well as of their Detailed Regulations or as to the responsibility imposed on an Administration by the application of these Acts, the question in dispute is decided by arbitration. To that end, each of the Administrations concerned chooses another member of the Union not directly interested in the matter.

2. If one of the Administrations in disagreement does not take any action on a proposal for arbitration within a period of six months, or of nine months in the case of distant countries, the International Bureau, on a request to that effect, calls on the defaulting Administration to appoint an arbitrator, or itself appoints one officially.

3. The decision of the arbitrators is given on an absolute majority of votes.

4. In case of an equality of votes, the arbitrators choose, with the view of settling the difference, another Administration with no interest in the question in dispute. Failing an agreement in the choice, this Administration is appointed by the International Bureau from among the members of the Union not proposed by the arbitrators.

5. If the disagreement concerns one of the Agreements, the arbitrators may not be appointed from outside the Administrations which participate in that Agreement.

Article 13. *Withdrawal from the Union. Cessation of participation in the Agreements*

Each Contracting Party is free to withdraw from the Union or to cease to participate in one or more of the Agreements by notice given one year in advance through the diplomatic channel to the Government of the Swiss Confederation and by that Government to the Governments of the contracting countries.

CHAPTER II. *Congresses. Conferences. Commissions*

Article 14. *Congresses*

1. Delegates of the countries of the Union meet in Congress not later than five years after the date of the entry into force of the Acts of the preceding Congress, with the view of revising these Acts or of completing them as necessary.

2. Each country is represented at the Congress by one or more plenipotentiary delegates furnished by their Government with the necessary powers. It may, if it so desires, be represented by the delegation of another country. But it is understood that one delegation can represent only one country other than its own.

3. In the deliberations, each country has one vote only.

4. Each Congress settles the place of meeting of the next Congress. The Government of the country in which the Congress is to take place is responsible, in consultation with the International Bureau, for convening the Congress, and also for notifying to all the Governments of the countries of the Union the decisions taken by the Congress.

Article 15. *Ratifications. Entry into force and duration of the Acts of Congresses*

1. The Acts of Congresses shall be ratified as soon as possible and the ratifications shall be communicated to the Government of the country in which the Congress was held, and by that Government to the Governments of the contracting countries.

2. If one or more of the Contracting Parties do not ratify one or other of the Acts

signed by them, these Acts are none the less binding on the States which have ratified them.

3. These Acts come into force simultaneously and have the same duration.

4. From the date fixed for the entry into force of the Acts adopted by a Congress, all the Acts of the preceding Congress are repealed.

Article 16. *Extraordinary Congresses*

1. When a request to that effect is made or approved by at least two-thirds of the contracting countries, an Extraordinary Congress is held, after arrangement with the International Bureau.

2. The regulations laid down by Articles 14 and 15 apply equally to the delegations, to the deliberations and to the Acts of Extraordinary Congresses.

Article 17. *Standing Orders of Congresses*

Each Congress draws up the standing orders for its work and deliberations.

Article 18. *Executive and Liaison Commission Composition. Functions. Working*

1. In the interval between Congresses, an Executive and Liaison Commission ensures the continuity of the work of the Universal Postal Union, in accordance with the provisions of the Convention and the Agreements.

2. The seat of the Commission is at Berne; in principle, the meetings of the Commission are held there.

3. The Commission is composed of nineteen members who exercise their functions during the interval between two successive Congresses.

4. The countries members of the Commission are appointed by Congress. At least half of the members must be replaced on the occasion of each Congress; no country may be chosen by three successive Congresses. The Director of the International Bureau exercises the functions of Secretary-General of the Commission.

5. The representative of each of the countries members of the Commission is nominated by the postal Administration of the country concerned. The representatives of countries members of the Commission must be qualified officials of the postal Administration.

6. At its first meeting, which is convened by the President of the previous Congress, the Commission elects from amongst its members, a President and four Vice-Presidents and draws up the Standing Orders for its work and deliberations.

7. The duties of the members of the Commission are gratuitous. The working expenses of the Commission are borne by the Universal Postal Union. The representatives of overseas countries may obtain repayment of the cost of a return ticket by air or by sea.

8. The expenses mentioned in para. 7 may not exceed 100,000 francs a year; they are added to those which the International Bureau is authorised to incur under the provisions of Article 27 of the Convention.

9. The Commission meets in regular session, in principle once a year, on convocation by the Chairman.

10. The Commission may invite to participate at its meetings, without the right to vote, any representative of an international organisation or any other qualified person whom it wishes to take part in its work. Consultative Sub-Commissions may be set up for the study of special questions.

11. The functions of the Commission are as follows:

(*a*) to maintain the closest contacts with the countries members of the Union with the view of improving the international postal service;

(*b*) to examine technical questions of any kind concerning the international postal service, and to communicate the result of these examinations to the countries members of the Union;

(*c*) to make contacts with the United Nations, its Councils and Commissions, as well as with specialised Agencies and other international Organisations, for the study and the preparation of reports to be submitted for the approval of the members of the Union. To send, as may be necessary, one of its members to represent the Union and to take part in its name at meetings of all these international organisations;

(*d*) to formulate, if necessary, proposals which will be submitted for the approval of the contracting countries in accordance with the provisions of Articles 22 and 23 of the Convention.

(*e*) within the framework of the Convention and its Detailed Regulations, to ensure the control of the activities of the International Bureau, of which it appoints, if necessary, and on the proposal of the Government of the Swiss Confederation, the Director and other superior personnel; to approve, on the proposal of the Director of the Bureau, the appointment of the other officials, and to authorise the employment of additional staff considered necessary; to prepare an annual report on the work of the Bureau, which it communicates to the members of the Union.

12. The Commission sends, for information, to the postal Administrations of all the countries of the Union an analytical review at the conclusion of each of its sessions.

13. The Commission makes a report to Congress on the whole of its activities and sends it to the contracting countries at least two months before the opening of the Congress.

Article 19. *Conferences*

1. Conferences for the consideration of purely administrative questions may be held at the request or with the assent of at least two-thirds of the Administrations of the Union. They are convened after arrangement with the International Bureau.

2. Each Conference draws up its own standing orders.

Article 20. *Commissions*

Commissions charged by a Congress or a Conference with the examination of one or more particular questions are convened by the International Bureau after arrangement with the Administration of the country where these Commissions are to sit.

CHAPTER III. *Proposals made between Meetings*

Article 21. *Introduction of Proposals*

1. In the interval between meetings, any Administration has the right to address to the other Administrations, through the medium of the International Bureau, proposals concerning the Convention, its Final Protocol and its Detailed Regulations.

2. The same right is accorded to the Administrations of the countries participating in the Agreements so far as these Agreements, their Detailed Regulations and their Final Protocols are concerned.

3. In order to be considered, every proposal introduced by an Administration in the interval between meetings must be supported by at least two other Administrations. A proposal lapses when the International Bureau does not receive, at the same time as the proposal, the necessary number of declarations of support.

Article 22. *Examination of Proposals*

1. Every proposal is subject to the following procedure: A period of two months is allowed to Administrations to examine the proposal and to communicate their observations, if any, to the International Bureau. Amendments are not admitted. The answers are collected by the International Bureau, and communicated to the Administrations, with an invitation to declare themselves for or against. Administrations

which have not notified their vote within a period of two months are considered as abstaining. The periods quoted above are calculated from the date of the circulars from the International Bureau.

2. If the proposal concerns an Agreement, its Detailed Regulations or the Final Protocol of either, only the Administrations which have adhered to that Agreement may take part in the procedure indicated in para. 1.

Article 23. Conditions of approval

1. In order to become binding, the proposals must obtain:

(*a*) a unanimous vote if they involve the addition of new provisions to, or the modification of, the provisions of Parts I and II, or of Articles 35 to 39, 57 to 63, 65 to 74 of the Convention, of any of the Articles of its Final Protocol and of Articles 101, 105, 117, 152, 163, and 184 of its Detailed Regulations;

(*b*) a two-thirds vote if they involve a modification of the provisions other than those mentioned under (*a*);

(*c*) a simple majority if they affect the interpretation of the provisions of the Convention, of its Final Protocol and its Detailed Regulations, except in the case of disagreement to be submitted to arbitration as provided for by Article 12.

2. The conditions to be fulfilled for the approval of proposals concerning the Agreements are fixed by the Agreements themselves.

Article 24. Notification of decisions

1. Additions to and modifications of the Convention, the Agreements and the Final Protocols of these Acts are sanctioned by a diplomatic declaration, which the Government of the Swiss Confederation undertakes to prepare and forward, at the request of the International Bureau, to the Governments of the contracting countries.

2. Additions to and modifications of the Detailed Regulations and their Final Protocols are drawn up and notified to the Administrations by the International Bureau. The same applies to the interpretations referred to under Article 23, para. 1, (*c*).

Article 25. Execution of decisions

No addition or modification adopted comes into force until at least three months after its notification.

CHAPTER IV. *International Bureau*

Article 26. General Functions

1. A central Office, situated at Berne, known as the International Bureau of the Universal Postal Union, and placed under the supervision of the Swiss Postal Administration, serves as a medium of liaison, information and consultation for the countries of the Union.

2. This Office is entrusted in particular with the collection, collation, publication and distribution of information of every kind which concerns the international postal service; with giving, at the request of the parties concerned, an opinion upon questions in dispute; with the preparation of a statement of the case in connexion with proposals for modifying the Acts of the Congress; with the notification of alterations adopted, and in general, with such enquiries and work in connexion with editing and arranging material as the Convention, the Agreements, and their Detailed Regulations shall assign to it, or as may be entrusted to it in the interest of the Union.

3. It acts as clearing-house for the settlement of accounts of every description relative to the international postal service between the Administrations which claim its assistance.

Article 27. Expenses of the International Bureau

1. Each Congress fixes the maximum figure for the ordinary annual expenditure of the International Bureau. These expenses, as well as the special expenditure occasioned

by the meetings of a Congress, Conference, or Commission, and the costs which may arise out of special work entrusted to the International Bureau, are borne in common by all the countries of the Union.

2. To this end, the latter are divided into seven classes, each contributing to the payment of the expenses in the following proportion:

1st class 25 units
2nd ,, 20 ,,
3rd ,, 15 ,,
4th ,, 10 ,,
5th class 5 units
6th ,, 3 ,,
7th ,, 1 unit.

3. In the case of a new accession, the Government of the Swiss Confederation settles, by agreement with the Government of the country concerned, the class in which the country is to be placed for the apportionment of the expenses of the International Bureau.[1]

[PART II. GENERAL REGULATIONS *omitted.*]

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[1] The English translation of that part of the Convention which is printed here is taken from the text presented to Parliament by the Postmaster-General and published as Cmd. 7435 (1948).

REVIEWS OF BOOKS

Précis de Droit International Privé Commercial. By P. ARMINJON. Paris: Librairie Dalloz. 1948. 620 pp. Francs 900.

Subject to some important exceptions, which include Travers in France, Diena and Cavaglieri in Italy, and Schnitzer in Switzerland, few attempts have been made hitherto to present in a comprehensive form all the aspects of the conflict of laws arising from the existence of certain branches of private law which are sometimes described by the all-embracing term of commercial law. Professor Arminjon has planned his work as a complementary volume to his deservedly popular treatise on private international law. The conflict of laws touches upon all aspects of human activities, and text-books on the subject cannot avoid treating a medley of unconnected subjects. This is not so in the more limited sphere of commercial law where the range of subjects is more or less well defined and where the topics are better interrelated. On the other hand, text-books on the conflict of laws in general are usually written from the point of view of one particular system of law. In commercial law, the similarity of the problems and of their solution and the not inconsiderable number of treaties for the unification either of the rules of domestic law or of the conflict of laws invite a treatment of questions of the conflict of laws on the broader basis of the legislation and practice of a number of countries. However, the advantage that the subject-matter is more compact is thus off-set by the disadvantage that the conclusions, offered with a view to not only one but several legal systems, are necessarily in the nature of comparative commentaries. French law furnishes the bulk of the material, but Swiss, Italian, German, and Anglo-American law are also drawn upon. This comparative and international outlook does not always let it appear clearly whether the author, where formulating his own conclusions, wishes to claim universal validity for them or not and whether he is speaking *de lege lata* or *de lege ferenda.*

Of the subject-matters to be discussed in a book on commercial law some are also treated in English text-books, while others are of little importance in common law countries. The latter include the rules determining who is a merchant. The former are principally such topics as corporations, contracts, bills of exchange, and cheques, as well as bankruptcy.

The treatment of corporations follows the orthodox continental doctrine which relies much upon the test where the corporation has its seat. In the chapter on the general principles of contract the author sets out with approval the doctrine that choice of law is only admissible in so far as the mandatory rules of the proper law permit it. This doctrine has not many adherents, and the courts everywhere have been reluctant to apply it. For Professor Arminjon it has lost many of its difficulties, since in his view most types of contracts have a proper law which can be ascertained by objective tests. Nevertheless, it is difficult to accept this doctrine since it introduces *renvoi* into the law of contract and involves a minute examination of the rules of the proper law in order to ascertain which rules are mandatory and which are only directory. On the other hand, the section on the formation and performance of contracts, frustration, the object of a contract, quasi-contracts, and the liability for accidents arising out of contracts of employment are valuable contributions. Here the author, using the analytical method, recommends solutions which deserve attention, even if a splitting up of the contract into various phases governed by different legal systems (*dépéçage*) is not always avoided.

The Geneva Conventions of 1930 provide the basis for the discussion of the law governing bills of exchange and cheques. This chapter gives the author an opportunity of summarizing his conclusions set out in a monograph in 1938 and of bringing them up to date in the light of continental legislation and practice. The result is a useful and detailed critical commentary on the working of the Conventions. The English reader will find the chapter on commercial contracts of special interest, for here the problems of Anglo-American and continental law are the same. In accordance with his general theory that every type of contract has its proper law, which can be ascertained objectively, Professor Arminjon discusses in turn the law governing contracts on the Stock Exchange and with banks, current accounts, brokerage, various types of agency, liens and the transfer of movables. Two lengthy chapters dealing with contracts of transport by rail and by air contain much useful information on topics which are normally omitted from English text-books on conflict of laws on the ground that these matters are regulated by international conventions. Insurance and bankruptcy are discussed in some detail in the concluding chapters.

Professor Arminjon is a leading authority in the field of private international law. His position as judge of a Mixed Court in Egypt has given him deep insight into the working of various systems of law, including the English legal system. These two qualifications have enabled him to produce a text-book which is both a comparative commentary on commercial law and a general treatise on private international law.

K. Lipstein

La 'Debellatio' nel Diritto Internazionale. By L. M. Bentivoglio. Pubblicazioni della Università di Pavia, Studi nelle Scienze Giuridiche e Sociali, No. 102. Pavia: Librera A. Garzanti. 1948. 100 pp. Lire 300.

The majority of writers on international law distinguish between conquest in the sense of taking possession of enemy territory in the course of belligerent occupation, and subjugation which is conquest followed by annexation. The author examines the intervening phase which occurs after conquest and before annexation. This phase is described as *debellatio*, and the object of the present book is to define its meaning and effects. The author finds the origins of the distinction between occupation and subjugation in the literature of the eighteenth century. The modern definition was first formulated by Heffter, *Le Droit international public de l'Europe* (1866), pp. 246–8, 339. The first question is whether *debellatio* is a fact with a neutral content or whether it is subject to the criterion of legality. This leads to a discussion on the birth and destruction of states and to a disquisition on the legal nature of war—a disquisition which culminates in a strange proposition of law. While disclaiming that he is advocating an *ex post facto* solution based on opportunist considerations, the author holds that war is still lawful if its specific ends have been achieved and international law has been changed to suit changing circumstances. He then examines the extinction of a state in the course of war, and this discussion leads, in turn, to an examination of the nature of states. The preliminary conclusion is reached that a state is extinguished if its entire organization has been dissolved. Turning to belligerent occupation, the author notes the controversy whether the occupant exercises *de facto* or *de jure* sovereignty and offers his own solution that the activities of occupant and occupied are alike *de facto* in the eyes of each other. This conclusion, which may be useful in so far as the recognition by municipal courts of foreign governmental acts is concerned, does not appear to be helpful in the sphere of international law, and the author himself concludes that both powers exist side by side, linked by some legal relationship, the nature of which he does not discuss.

The author then contrasts belligerent occupation and *debellatio*. The current distinction to the effect that the former is temporary and leaves the opponent's statehood untouched, while the latter is permanent and follows upon the destruction of the opponent's statehood is rejected in favour of the criterion whether the belligerent occupation has affected the entire country of the opponent, irrespective of the question whether this occupation is temporary or not and whether an *animus debellandi* can be found. It follows that Germany has been the object of *debellatio*, and that the status of the various governments in exile during the Second World War raises political but not legal questions. The author then inquires whether *debellatio* or subjugation is an original or derivative mode of acquiring territorial sovereignty and concludes that it is neither. The occupant must intentionally perform a formal act if he wishes to acquire the territory. This leads the author to a further discussion on the nature of sovereignty. He examines various theories and dismisses them in favour of the *Competenztheorie*. The author concludes that in the case of *debellatio* the question whether the occupant has acquired sovereignty is a question of fact, namely, whether the occupant has assumed authority. This may happen as a result of a cession; otherwise the title is original. It follows that *debellatio* itself is not a mode of acquiring territory, although it may be followed by incorporation or annexation. If it is not accompanied by annexation then *debellatio* may cover a variety of forms of government which preserve the integrity of the opponent state.

At first sight it would appear that the author suggests an original thesis with the help of considerations which are exclusively drawn from theory. He relies strongly on general doctrines relating to the nature and extinction of states and to the legality of war, and his amply documented treatment shows that he has complete mastery of his material, both Italian and foreign. Upon examination it appears that his thesis provides the doctrinal foundation for the practice of the Axis countries during the Second World War, and also to a certain extent for that of the Allies towards Germany after the war. Objections may be raised not only against his view of the legal nature of war, but also against his main thesis which would permit the annexation of a totally occupied country, even while the war is being carried on by the allies of that country. Once again the 'normative power of facts' provides the basis of a legal theory. On the other hand, the new theory fills a gap, for at present *debellatio* has many forms which cannot be explained by reference to the old forms of cession and annexation. However, if the author's theory fills the gap it opens another, for it must follow necessarily that in the case of *debellatio*, even where the war is continued by the allies of the occupied state, the provisions relating to belligerent occupation as laid down in Hague Convention IV no longer apply. This result has been foreshadowed in recent literature. It has now received a theoretical foundation.

K. LIPSTEIN

Domestic Jurisdiction. The Exception of Domestic Jurisdiction as a Bar to Action by the League of Nations and the United Nations. By C. B. H. FINCHAM. Leiden: A. W. Sijthoff's Uitgeversmaatschappij. 1948. ix+198 pp.

To establish the meaning and scope of the exception of domestic jurisdiction is as important as it is difficult; for it involves all the basic problems of international law, such as the relationship of international and municipal law, the jurisdiction of international tribunals, vital interests, and all those elusive but powerful ideas associated with the so-called fundamental rights of sovereign states. The problem is made the more complicated by the variety of forms and contexts in which the exception of domestic jurisdiction appears: whether as a principle of customary international law, as a clause in treaties of arbitration, as a frequent reservation to acceptances of the optional clause of the Statute of the World Court, or as a clause limiting the competence of international organizations and institutions. Mr. Fincham has limited his inquiry, in what he modestly calls an essay, to paragraph 8 of Article 15 of the League of Nations Covenant, and paragraph 7 of Article 2 of the Charter of the United Nations. It is a learned and illuminating piece of work which will amply repay reading and re-reading.

The first part of the book deals with the domestic jurisdiction clause of Article 15 of the Covenant of the League of Nations; its history and the preparatory work; its juridical meaning and interpretation; and, finally, the jurisprudence which has grown up around the clause in judgments and arbitral awards, with particular reference to the leading cases of the *Åaland Islands* and the *Tunis and Morocco Nationality Decrees*. From this survey the author reaches two main conclusions. First, the clause was found in practice to be nothing like so important as had originally been feared: 'the reservation of matters of domestic jurisdiction was at best ineffective; at worst it introduced an anomaly into the Covenant the effects of which the Members tended to avoid by bringing their disputes to the Council under other articles of the Covenant'. Secondly, it did not grant to the individual state the unbridled discretion which it might appear to do in theory: 'the international body, and not the State in the exercise of its sovereignty decided in a given case whether or not the exception applied; this fact alone represents a very significant advance on the old methods of settling disputes under treaties of arbitration'.

However, although the experience of the working of the Covenant is valuable material, the interpretation of the text is now a matter mainly of historical interest, and it is proper that Mr. Fincham devotes the greater part of his study to an exposition of the materials available for the study of the corresponding clause of the Charter of the United Nations. This is a difficult task, for the Charter is barely four years old, and opinion and practice have hardly had time to settle down into defined channels. Nevertheless, a surprising amount of material is already to hand and we are much indebted to Mr. Fincham for his careful exposition and analysis of it. As yet, the courts have not had an opportunity of considering the clause, but its erection in the Charter into a general principle has meant that it has been invoked already in a number of disputes before the Security Council and the General Assembly. In addition therefore to the preparatory work, Mr. Fincham has been able to draw upon the experience of the working of the clause in disputes over Indonesia, Spain, Greece, and the treatment of Indians in South Africa.

It is curious that a clause which was thought important enough to appear as a general principle governing the whole Charter, and about which there was so much debate, should finally have been drafted so obscurely. At the outset one is met by the difficulty of knowing precisely what was meant in this context by 'intervention'. If it means what it almost invariably means in international law, viz. dictatorial interference accompanied if not by force at least by a threat of force, then paragraph 7 of Article 15 comes very near to cancelling itself out when it adds the proviso that the domestic jurisdiction exception shall not 'prejudice the application of enforcement measures under Chapter VII'. Moreover, as Professor Lauterpacht has pointed out, the General Assembly is not in any case given power to intervene in any proper sense of the word; it may only discuss and recommend. On the other hand, there is the view put forward by Field-Marshal Smuts in the South African case over the treatment of Indians, that 'intervention' is here used in its broad everyday meaning and was not intended to be understood in the narrow technical sense of the word. This case can be supported in some measure from the preparatory work; but, as the author points out, it seems very unlikely that an international court could allow an inference from the somewhat lax uses of the word 'intervention' in some of the speeches of delegates at San Francisco to upset what appears to be the clear legal connotation of a term of the Charter. He does, however, suggest a third view. He thinks that it is possible to argue that 'the Assembly could pass a resolution which, though it would not in itself amount to an intervention in the strict sense of the word, might contain a threat of intervention to follow', and he cites by way of illustration the resolution of the General Assembly in the Spanish case as approaching 'perilously close to such a definition'. Admittedly, intervention even in its strictest sense includes a threat of force; but, with respect, it seems difficult to agree that a threat of force by a body which has no legal authority to implement the threat can amount to intervention, without again importing a modification of the meaning of intervention. So that the argument would appear to be not a third view but a circuitous return to the Smuts view.

Perhaps the most disturbing innovation in paragraph 7 of Article 2 of the Charter is omission of all reference to international law as the measure of the content of the exception. This was explained by the chairman of the United States delegation at San Francisco on the ground that 'the body of international law on this subject is indefinite and inadequate. To the extent that the matter is dealt with by international practice and by text writers, the conceptions are antiquated and not of a character to be frozen into the new Organization.' This is a surprising statement. One can easily sympathize with the expression of impatience with the traditional rules of international law on the matter, for the exceptions which it countenances in favour of domestic jurisdiction include such matters as armaments, economic and financial policy, immigration, and nationality; in short, the domestic competence is protected in precisely those matters which vitally concern foreign policy and may very nearly affect international relations. However, to suggest, as the chairman of the United States delegation appears to do, that the position can be mitigated by the simple expedient of omitting any reference to international law is as astonishing as it is naïve. As Mr. Fincham comments: 'It is very difficult to see how "antiquated conceptions" could be "frozen into the new Organization" by a mere reference to international law, especially as the criteria of law must in any case be applied in the absence of any other objective standard.' With respect, however, omission of any reference to international law may be a more serious matter than the author suggests; for in the absence of the objective standard of international law it might be argued that a subjective test may be applied. In other words it might be claimed that the sovereign state may decide in its own discretion what matters belong to its domestic jurisdiction. Indeed, that view has already been written into the reservations made by the United States in accepting the optional clause of the Statute of the International Court of Justice. Thus, to omit all reference to international law in the domestic jurisdiction clause of the Charter, far from banishing those antiquated notions of which the chairman complains, comes near to giving them free rein while casting doubt upon the only legal machinery that exists for their modification. Indeed, in the last resort, the condition where the prerogatives of domestic jurisdiction are delegated from and defined by a system of international law superior to domestic law, is the only one consistent with the existence of an international law that can be said to be a law in any proper sense of the word.

These examples must suffice to illustrate the several problems of interpretation that Mr. Fincham raises and discusses. Almost every word in the clause needs a commentary. Enough has been said, however, to show that it is very malleable material which is capable of liberal or of restrictive interpretation. Much depends, therefore, on the machinery of interpretation. As the clause is a general principle of the Charter the primary duty of interpretation must fall on the particular organ seized of a dispute, with or without the assistance of an advisory opinion of the International Court of Justice; assuming, that is, that the view that a state may decide for itself must be rejected as being inimical to the authority both of international law and of the United Nations itself. It follows that the voting procedures of the principal organs of the United Nations become of importance in deciding how the clause may be interpreted in relation to any particular dispute. If the question comes before the Security Council, is it a matter of 'procedure' or is it one of those 'other matters' to which the right of veto applies? In an interesting argument Mr. Fincham concludes that it depends on the form in which the question is put. A motion to uphold an appeal to the clause, being in effect a motion to deprive a party of his right to appeal to the jurisdiction of the Security Council, must be a matter of substance and therefore subject to the veto. He suggests, however, that a mere motion that the Security Council is competent to deal with a dispute would be one of procedure and not subject to the veto. He applies the same argument *mutatis mutandis* to the voting procedures of the General Assembly, However that may be, the interesting aspect of the situation is not so much the voting procedure to be applied as the very fact that an essentially legal question concerning a dispute may, with or without an advisory opinion of the Court, be decided by a vote of a body which, whatever else it is, is certainly not a court in any sense of the word. In other words, here are the beginnings of true international administrative law, and the place of such machinery in the general body of international law is worthy of study in the light of experience already gained in municipal administrative laws.

It is not possible in the space of a review even to mention the many other connected problems which Mr. Fincham raises and discusses. One thing, however, is abundantly clear: the meaning and scope of this clause of the Charter will only become apparent as it is shaped, defined, and modified by the practice of the appropriate organs of the United Nations. Mr. Fincham's tentative conclusion from the experience thus far gained is an encouraging one. 'For a variety of reasons—including the loose and ambiguous wording of the text, its inherent conflict with the spirit of the Charter, and the rules of voting by which it must be upheld or rejected by the organ seized of the dispute, the domestic jurisdiction clause is tending to become a dead letter.' That is a development much to be desired. It may very well be that the very obscurity of the drafting is a blessing in disguise.

This, if we may be allowed to say so with respect, is a scholarly, stimulating, and immensely thoughtful study, which will assuredly take its place as a standard work on the subject.

R. Y. Jennings

Il Fallimento nel Diritto Processuale Civile Internazionale. By MARIO GIULIANO. Milan: A. Guiffrè. 1943. viii + 432 pp. Lire 1100.

The problems raised by the conflict of bankruptcy laws are to a greater or lesser extent the same in all countries. The limits of the jurisdiction of the *forum* and of foreign countries to entertain bankruptcy proceedings, treaties, and proposals for reform are the four principal topics. Among these, the first two are naturally of greater interest than the others. They are not problems of private international law proper, for it has never been suggested that the *forum* applies foreign bankruptcy laws. They concern the question how to limit the procedural powers of local and foreign courts and belong to what may be called the private international law of procedure or to international administrative law. Their solution must depend on the theoretical approach to these subjects. If, like private international law, they are regarded as part of municipal law, then the rules of the conflict of laws in matters of bankruptcy of each country are free to determine at their discretion in what circumstances to apply their own laws of bankruptcy and when to exclude or to admit those of other countries. It is not surprising that on the basis of this theory the *forum* tends to claim for itself a rather wider jurisdiction than it is willing to concede to others. If, on the other hand, according to *a priori* principles, alleged to be principles of international law, it is assumed either that bankruptcies form a unity or have universal effect or that they may form several masses and have only territorial effect, it follows that the *forum* can have no wider jurisdiction than other countries are granted and that rules of the conflict of laws in matters of bankruptcy can be established which are of universal validity. No country has unconditionally adhered to the latter doctrine, which has usually been employed to bolster up the far-reaching claims of the *forum* that its proceedings affect the assets abroad of the debtor. In the face of foreign bankruptcies the *forum* tends to adopt the doctrine of territoriality and to restrict the foreign proceedings to the limits of the territorial jurisdiction of the foreign court, while recognizing the title of the foreign trustee to the assets within the jurisdiction of the *forum*. This result is reached by applying the ordinary rules of private international law regarding universal assignments. It is not reached by the application of special rules concerning the recognition of foreign bankruptcies. This combination of rules which claim universal effect for local bankruptcies and recognize the effects of foreign bankruptcies leads not unnaturally to conflicts of priorities which may be complex. As a means to decide conflicts between local and foreign bankruptcies this solution is obviously deficient, but it has been adopted by many countries. It has seldom been cast into legislative form, but English law, after some wavering in previous legislation, has defined the jurisdiction of English courts in ss. 1 and 4 of the Bankruptcy Act, 1914. But even so, this provision was not sufficient, for it is necessary, in addition, to determine whether an act of bankruptcy has been committed in circumstances the territorial nature of which attracts the operation of the English Bankruptcy Act. As regards foreign bankruptcies, these have not been placed on the same footing with English bankruptcies, but leaving apart ss. 121 and 122 of the Bankruptcy Act, the title of foreign trustees in bankruptcy is recognized in England on the basis of the ordinary principles of the conflict of laws. Incomplete and somewhat illogical as they are, the English rules are nevertheless explicit and reasonably easy to apply. Other countries, including Italy, are not in such a fortunate position. In Italy, for the first time a fragmentary provision is to be found in the Bankruptcy Act, 1942, s. 9.

The author examines the practice of Italian courts and of writers in order to find some general principles which may be said to have guided the courts before and after the passing of the new Act. To this end he analyses the nature of proceedings in bankruptcy and, rejecting various theories which treat them as administrative or as non-contentious, concludes that they have the character of contentious litigation. Further, he distinguishes between two phases in the procedure of bankruptcy: the litigious stage leading to a declaratory order, and the stage exclusively concerned with execution. This distinction assists him in integrating the recognition of foreign bankruptcy decrees into the Italian legal system. He recognizes that the question whether and to what extent Italian courts have jurisdiction is not a question of the conflict of laws but of self-limitation, to be determined by Italian domestic law. Italian practice is united in requiring that the debtor must be a merchant according to Italian law, but is divided on the issue of universality or territoriality. However, this issue is mainly of theoretical importance for the purposes of Italian courts in so far as the effect of Italian bankruptcies abroad is concerned, though not in the converse case where the effect of foreign bankruptcies in Italy is involved. For the author the problem has lost much of its importance, since he regards a bankruptcy decree as a judgment. Thus the question of jurisdiction arises in Italy only when the proceedings are initiated there. Foreign bankruptcies raise a question of recognition of foreign judgments. Turning to the limits of the jurisdiction of Italian courts, the author examines the various legislative provisions which may provide guidance and finds them of little use. He concludes that the debtor must be a merchant carrying out his activities in Italy, whether by means of a principal or ancillary establishment, although not by means of an agent, or must be a company incorporated in Italy or having a place of business in Italy. The most interesting contribution is to be found in the chapter on the effect of foreign bankruptcies where the author discusses the views of the majority of writers and offers his own solution. Proceeding from the premisses, first, that bankruptcy orders are declaratory judgments and, second, that they are followed by a phase of execution which, in Italy, can only be Italian, he holds that the question of the effect of a foreign bankruptcy is nothing else than that of the effect of a foreign judgment. From this it follows, according to Italian law, that an action for the enforcement of the foreign judgment must be brought in Italy (*delibazione*) which is subject to stringent requirements of Italian law. One of these, i.e. that the foreign proceedings must be comparable to those known in Italian law, has created much difficulty in practice where English winding-up orders are involved. It follows, further, that the extent of the rights of a foreign trustee in bankruptcy are determined by Italian law, and may be more extensive or more limited than those accorded by the law of the foreign country where the bankruptcy occurred. On the other hand, there is no discrimination between Italian and foreign creditors. If this is correct, then it is difficult to explain the assertion that the prohibition against individual acts of execution applies only in the case of an Italian bankruptcy (pp. 239, 240, 245, 248), but the statement may mean possibly nothing more than that the doctrine of relation back does not apply where a foreign bankruptcy is recognized in Italy (p. 307). The conclusion that foreign bankruptcies have no direct effect in other countries, but operate indirectly through the medium of private international law—in Italy through the rules giving effect to foreign judgment, in England in virtue of the rules governing universal assignments—is original and attractive. In so far as the author contends that a foreign bankruptcy is a fact which may have effects in Italy in accordance with Italian domestic law, this doctrine must be confined to Italy. In England a foreign bankruptcy and a foreign universal assignment, which may be an act of bankruptcy in England, raise two separate questions which require different answers in each case.

The author believes that his solution contributes to the unity of proceedings in bankruptcy, but this may be doubted. Italian courts, by reserving for themselves a very wide jurisdiction, may well contribute to the process of splitting up bankruptcies. The chapter ends with some interesting observations on discharge and deeds of arrangement. The remainder of the book is taken up by an analysis of the treaties dealing with bankruptcy, especially of those concluded by Italy, and by a discussion of the various international movements for the unification of the rules dealing with jurisdiction in bankruptcy.

The author has treated his subject with much diligence. Italian and foreign writers are cited extensively and—a rare occurrence in Italian literature—great attention is paid to the vacillating and somewhat inconclusive practice of the Italian courts. His independent and original conclusions are well founded and deserve attention also outside Italy. On the other hand, his treatment of the subject is at times repetitive and pays excessive regard to theoretical considerations put forward by other writers. However, it is clear that the scant literature on what is a highly theoretical and technical topic has now been enriched by a thorough and sound work.

K. Lipstein

The Grotius Society. Transactions for the Year 1946. Problems of Public and Private International Law. London: Longmans, Green & Co. 1947. xvii+167 pp. 25*s.*

The object of the Grotius Society is the study and advancement of international law. The latest volume of its transactions amply fulfils both objects. It includes both contributions on controversial points of international law, and discussions, by leading authorities, on the problems of its development.

The volume opens with a paper by Mr. C. W. Jenks on 'The Status of International Organisations in Relation to the International Court of Justice'. The author has an unrivalled knowledge of the practical problems of international organizations and this is fully apparent in the present study. In its first part he discusses the provisions of the Statute of the International Court of Justice which concern international organizations. In the second part he examines some of the practical problems arising from these provisions, both with regard to the procedure of the Court in dealing with the interests of international organizations, and with regard to the action to be taken by the General Assembly in authorizing the Economic and Social Council, subsidiary organs of the United Nations and specialized agencies to request advisory opinions from the Court. Finally he discusses the desirability of enabling international organizations, in the not-too-distant future, to have recourse to the contentious jurisdiction of the Court, particularly in view of the fact that these have the power to conclude international agreements which are liable to require interpretation.

Mr. Diplock, in a paper entitled 'Passports and Protection in International Law', argues that passports have, in themselves, no importance in international law, as they cannot alter the rule that states can only protect their own nationals. Passports are, at best, prima facie evidence of the nationality of individuals to whom they are issued. The author does not raise the question whether there are grounds for desiring a departure from so restrictive a principle as the nationality of claims in international law. It might be useful, should states in the future be given the right to protect stateless persons or refugees normally resident in their territory, if the persons so protected were characterized by the issue to them of some form of national passport.

Professor Llewelyn Davies, in a paper entitled 'Domestic Jurisdiction, a Limitation on International Law', discusses the meaning of Article 2 (7) of the Charter of the United Nations. The writer points out that the reservation of matters of domestic jurisdiction in the Charter is more far-reaching than its counterpart in the Covenant of the League of Nations. He expresses the hope, however, that the force of international public opinion will be such as to avoid the necessity of 'intervention' in the domestic affairs of states. He implies, though he does not actually suggest, that the United Nations can take measures short of intervention with regard to matters of domestic jurisdiction. He does not discuss the question whether the inclusion of matters such as the encouragement of respect for human rights in the Charter of the United Nations has not removed them from the category of matters essentially within the domestic jurisdiction of states.

In a paper on 'Nullity of Marriage and the Conflict of Laws' Professor Cheshire surveys the practice of English courts with regard to jurisdiction over nullity suits, the law applicable to them, and the recognition of foreign nullity decrees. In his view that practice has been confused and illogical, though it has sometimes achieved socially desirable results. Since the paper was written, the position with regard to jurisdiction over nullity suits has been clarified by the decision of the Court of Appeal in *de Reneville* v. *de Reneville*, [1948] 1 All E.R. 56. The Court agreed with Professor Cheshire in rejecting mere residence of the petitioner wife in this country as a sufficient ground of jurisdiction. For the rest it revived the arguments of *Inverclyde* v. *Inverclyde*, [1931] P. 29, to which Professor Cheshire gives qualified approval.

Mr. Graupner, in dealing with 'Nationality and State Succession', makes a contribution to a subject the law of which, important though it is in practice, is extremely obscure. The basis of his argument is the assumption that a change of sovereignty is immediately accompanied by acquisition of territorial jurisdiction within the acquired territory, but that the assumption of personal jurisdiction over persons within that territory is optional, and over persons who are natives of the territory but resident in third states impossible. He applies this principle to the various different cases of state succession, and exhaustively reviews the practice of states in the matter.

'Colonial Mandates and Trusteeships' are a subject which Professor Bentwich has made his own. In this paper he compares the provisions of the Covenant of the League of Nations and the Charter of the United Nations with regard to colonial territories held in 'trust'. This is the most lucid exposition of the subject published hitherto.

In 'A Plea for the Codification of International Law on New Lines' Sir Cecil Hurst has given readers a great deal of food for thought. His conclusions are that the aim in codifying international law should be to find agreement on basic principles, leaving aside at first details on which there is disagreement, or improvements in the law which may ultimately be desirable; that the work should be done by experts, not by governments who necessarily aim at changing the law; and that it should be done both by national and international effort. Some will disagree with Sir Cecil's conclusions. It has been argued that agreement on general principles without agreement on details does not meet the requirements of international law, and that codification without 'development' is liable to lead to a perpetuation of principles which are out of date. But Sir Cecil's arguments, which are forcefully presented and which bear the stamp of his long-standing knowledge of the problems of international law, cannot be lightly rejected.

The volume concludes with a stimulating paper by Sir Arnold McNair on 'International Law in Practice'. Sir Arnold first discusses the sphere of operation of international law, and draws an analogy between the domestic jurisdiction of states and matters which by municipal law are left to the determination of individuals. In both cases the sphere of the law is growing. Sir Arnold then surveys the administration of international law by courts, particularly by the Permanent Court of International Justice. Thirdly, he draws attention to the respect paid to the decisions of these courts. His final exhortation to English lawyers to interest themselves in the problems of international law and to bring to its development the experience of English municipal law, is a fitting note on which to end an outstanding volume of the *Transactions of the Grotius Society*.

F. M.

Mandates, Dependencies and Trusteeship. By H. Duncan Hall. Washington: Carnegie Endowment for International Peace, Studies in the Administration of International Law and Organization, No. 9. xvi+429 pp.

The method no less than the content of this book is indicated by its title. It purports to be an historical account of both the mandates and the trusteeship systems which has grown out of a study of the former prepared in mimeographed form 'for the use of a restricted circle of interested persons in connection with the United Nations Conference at San Francisco'. And it has grown by a process of interstitial addition rather than of re-writing, with the result that it is somewhat disjointed and repetitive. The section on Trusteeship, which comprehends not only the trusteeship system but also the régime prescribed for 'non-self-governing territories' by Chapter XI of the Charter of the United Nations, occupies only thirty-two pages, but there are many excursuses touching trusteeship scattered throughout the book. Moreover, the texts of Chapters XI to XIII of the Charter, the Rules of Procedure of the Trusteeship Council, and portions of the text of eight trusteeship agreements and of the Treaty of Peace with Italy are printed in the many appendices.

Mr. Hall asserts the origin of the trusteeship system, that is of the concept of a trust of dependent territories in the interest of their inhabitants, to lie in the British rule of India (p. 11). But he does not follow this argument up, unless a reference to a somewhat vague statement of Sir Thomas Munro (p. 95), and to Burke's use of the phrase 'sacred trust' during the impeachment of Warren Hastings (p. 33) can be regarded as adequate evidence for the thesis. And this is but an example of the lack of continuity in this 'history'. No doubt the administration of dependent peoples has a history of a sort, but it seems questionable whether any better definition of the mandate system can be found than that given by Lord Lugard, which Mr. Hall himself admits to go to the heart of the matter: 'The Mandate system is a term applied to the conditions set up by the Treaty of Versailles for the administration of the former overseas possessions of Germany and Turkey' (p. 30).

More striking than his history is Mr. Hall's geography. His first chapter, entitled 'The International Frontier' and supplemented by a map of the 'Main Line of Structural Weakness in the Earth's Political Crust' in the end-papers, contends that there is a zone 'in which the great powers, expanding along their main lines of communication to the limits of their political and economic influence and defence needs, impinge upon each other in conflict or compromise'. Here, and here only if the thesis be understood, have occurred 'the main crises and eruptions of world politics in modern history'. And here alone have arisen the international territorial régimes, so that trusteeship, mandates, protectorates and all the other devices for the government of 'non-self-governing territories' may be described as 'phenomena of the international frontier'. There is either a profound and unrecognized truth in this, or it is a very complicated way of stating that the land of the world is divided up into sovereign states and non-sovereign territories.

Clive Parry

Prisoners of War. Washington: Institute of World Polity, School of Foreign Service, Georgetown University. 1948. 98 pp. $1.50.

The literature on the status and treatment of prisoners of war is meagre, and this study, embodying the fruits of the experience of the Second World War, is a welcome contribution to the subject. It is, in essence, the report of a study group on prisoners of war, organized by the Institute of World Polity. The group, consisting of former American prisoners of war who are also students of international law, was guided in its discussions by Dr. Ernst Feilchenfeld, who acted as *rapporteur*.

Stress was laid during the discussion on the changes which modern total warfare has wrought in the treatment of prisoners of war. The blurring of the distinction between soldier and civilian, illustrated by the growth of guerrilla warfare in all its forms, the increasing severity of economic warfare directed against the entire enemy population, and, above all, the vast increase in the size of modern armies and, therefore, in the number of prisoners made captive, have all contributed towards rendering the provisions of the Geneva Convention of 1929 inadequate to modern needs. These historical changes are rightly emphasized, for any new convention on the treatment of prisoners of war must take them into account. In particular, such a convention must establish a minimum standard of treatment, appoint an efficient protective agency and ensure that effective sanctions are imposed for non-observance of the convention. On these three topics, the suggestions advanced by the group are many and varied. On the substantive question of treatment, the proposals gain added force from the fact that they are based on actual experience. The conclusions of the group on the procedural questions of protective agencies and sanctions for non-observance of any new convention are, however, more controversial. It is generally conceded that the welfare of prisoners is not sufficiently secured by the Red Cross, and that, if the latter is to continue to operate as the official protective agency, it must be radically reformed. Many, however, are of the opinion that the task of protecting prisoners of war should be entrusted to an authority more capable of influencing the belligerents. An interesting suggestion in this matter is that the normally accredited diplomatic representatives of the belligerent states should stay at their posts in enemy territory during hostilities in order to undertake this function. It is possible that such direct representation would have the desired effect, but it is, to say the least, doubtful whether the belligerents would be prepared to concede the presence on their territory of enemy diplomats, even if reciprocity were guaranteed. The nature of modern warfare, with its insistence on the severance of all overt communication with the enemy, would hardly permit of such an innovation, however desirable.

Closely linked with the question of supervision is that of sanctions for non-observance of agreed provisions for the treatment of prisoners of war. In the international sphere, the problem of sanctions is an ever-recurring theme, and here it is rendered more troublesome by the fact that, until hostilities cease, effective jurisdiction cannot be exercised over the individuals responsible for maltreating prisoners. Any immediate reaction to such maltreatment must take the form of reprisals against enemy prisoners, a procedure at once inequitable, unsatisfactory, and likely to provoke counter-reprisals. Consequently, the conclusion of the group is that the only possible deterrent against maltreatment is the prospect of subsequent punishment for war crimes of the individuals responsible for brutalities against prisoners.

I. M. Sinclair

Voting Procedures in International Political Organizations. By Wellington Koo, Jr. New York: Columbia University Press. vii+349 pp. $4.00.

The Introduction to this book contends that there is 'no intrinsic difference between an organization set up to regulate coffee and one set up to regulate peace. Such differences of structure and voting procedures as have existed have found their true justification in the differences in function of an organization concerned primarily with the power relationships of states, and organizations designed primarily to regulate other aspects of international life.' In other words, according to this 'functional theory of voting procedures', international organizations must be graded according to the greater or less extent with which they are concerned with the 'power relationships of states'. At the bottom of the scale are those organizations which function in a neutral zone and in which votes are allocated upon considerations of technical efficiency alone, and at the top are those in which power must be apportioned in proportion to the individual power or responsibility of the members. And between the two extremes there are many bodies whose mode of proceeding is the result of a compromise, the exact nature of which is governed by the extent to which the 'vital interests' of members is involved.

This somewhat cynical thesis is admirably argued in the succeeding chapters. The learned author, who has inherited a name which is itself a part of the history of international organization, has drawn in particular upon his own records of the proceedings of the Committee of Five at San Francisco concerning the voting procedure of the Security Council. This part of his book is by itself of great value. For no official record was made of those proceedings and the evidence of Dr. Wellington Koo, which has gone uncontradicted, is the first statement we have of what went on. However, Dr. Koo's researches are not confined to this. He begins by examining 'Some Recent Non-political Organizations', including U.N.R.R.A., 'a true sample of the principles upon which other organizations of the United Nations might expect to be founded', F.A.O., 'the first *permanent* organization of the United Nations', I.C.A.O., 'another example of the device [of providing] for functional differences among member states through a qualified representation in the executive body, rather than through any system of weighted voting in a body whose membership may be universal', the International Fund and Bank, organizations 'fraught with a considerable amount of political interest' but in which 'the functional aspects of international control are predominant', and the I.L.O., 'a combination of national interests and class interests', study of whose voting procedure does not, however, notwithstanding the dual nature of the organization, 'reveal a startling innovation from that of other non-political organizations'. The accounts given of the voting methods of these bodies and of their origins are excellent. But, as some of the phrases quoted perhaps indicate, the learned author is given to the use of a rather self-conscious terminology which makes him a little difficult to follow. The present writer finds his use of the epithet 'functional' confusing and would have liked to see a final section in the chapter on non-political organizations stating simply what is the upshot of their detailed examination.

But in this connexion it is fair to point out that Dr. Koo is primarily concerned with political organizations. Those which fall within the scope of his work are the League and the United Nations. Their discussion is preceded by a valuable sketch of the history of collective political action prior to the League. And, though it is the Security Council which is chiefly treated, a chapter is devoted to other organs of the United Nations, namely, the General Assembly and the Economic and Social and Trusteeship Councils. Further, the final chapter is devoted to the author's conclusions. These are introduced, somewhat unfortunately, by the declaration that 'the role of voting procedure in international organizations is a functional one; that is, it is commonly adapted to the functions which the member states intend the organization to have'. If this means anything more than that there is no voting procedure common to all international organizations, liberty is taken to say that it would indeed be remarkable if the situation were otherwise than as described. As applied to the Security Council in particular, however, the thesis becomes more understandable: the political core of any organization designed to maintain a peace once established is the continued harmonious co-operation of the great powers making up the victorious alliance. The interest any such power has in the organization is the interest it had in the alliance. Only so long as the separate national interests of the Great Powers can be accommodated by mutual consultation and agreement within the organization will their interest in the maintenance of peace persist. Hence the justification for the 'veto'. The Security Council is a body designed to secure peace when, but only when, the Great Powers desire it to be secured and its voting procedure is devised accordingly. That is the 'function' of the body, and its voting procedure is thus 'functional'. Equally, the voting procedures of other international organizations derive their individual characteristics from the differing functions of such organizations.

This thesis has been characterized above as tending to the cynical. Dr. Koo argues admirably and has marshalled his arguments in an eminently scholarly fashion. The material he has assembled is so valuable and he has set it out so well that one is disinclined to quarrel with the moral he seeks to draw and which, in a Preface written after the first year of the United Nations' working, he still wishes to assert. Nevertheless, it is difficult to resist asking whether, even if his analysis be correct, he is right in approving what he finds. If the Yalta Formula was dictated by the considerations to which he adverts, if the Security Council was intended to have only the 'function' he asserts, namely, the preservation of peace so long as all the Great Powers agree to its preservation and no longer, is this to be welcomed as corresponding to 'political reality'? Perhaps Dr. Koo neglects the difficulty of deciding what 'reality' is, and what is the corresponding 'function' of the organization for peace. At least one of the Great Powers which favoured the 'veto' at Yalta seems now to have changed its view, or rather to have come to realize that its view was insufficiently long-sighted. Were all the Great Powers to come to the same conclusion, presumably the 'veto' would be abolished. In that case the 'function' of the Security Council would, conceivably, be regarded as enlarged so as to include the preservation of peace even over the objections of a Great Power. The 'functional theory' of voting procedures would thus still hold good. Dr. Koo might therefore reply that all that is being objected to is the facts of the case as they were at Yalta. But possibly the objection goes deeper than that, and is that his theory involves an over-simplification of the motives of the makers of international organizations, taking no account of the unconscious element in constitution-making.

Legal Effects of War. By SIR ARNOLD DUNCAN McNAIR. Third edition. 1948. Cambridge University Press. xxiv+458 pp. 25*s.*

The second edition of this book—now acknowledged as the standard treatise on the subject and frequently cited in judicial decisions—was reviewed in the 21st volume of this *Year Book* (1944, p. 253). Although the author has contrived to preserve the pagination of the second edition (with the exception of pages 191–228 and the Appendix), the volume has been revised throughout in the light of the developments of the intervening four years. This applies, in particular, to the chapters concerned with the law of belligerent occupation. In a note (on p. 354) relating to the status of Germany subsequent to her unconditional surrender on 5 January 1945, the author lends the weight of his authority in support of the opinion that the Allied occupation of Germany which began after the capitulation 'juridically differs from, and goes beyond Belligerent Occupation'. This is believed to represent the sound view of the legal position notwithstanding the fact that the Allies expressly disclaimed any intention of annexation and that the state of war with Germany has not, in law, come to an end. Beyond the statement quoted above, Sir Arnold does not commit himself to an expression of a view as to the legal basis of the Allied measures and legislation regulating matters normally falling within the sphere of the belligerent occupant. This is a question which, he says, the English courts may have to consider some day. Judging from the manner in which English courts have brought novel situations connected with war within the orbit of legal principles based on common sense and justice, it is not expected that they will be baffled by the unusual circumstances of the situation created by the Allied régime in Germany.

With regard to one particular problem arising out of the war and the approach to which by English courts has so far been somewhat disquieting, Judge McNair has given an intimation of a correct solution of the difficulty. In summarizing the decision in *Rex* v. *Home Secretary*, *Ex parte L.*, [1945] K.B. 7, to the effect that the decrees of the enemy promulgated during the war and purporting to make some of his nationals stateless will not be recognized by English courts, he adds the important qualification: 'at any rate during the war'. The decision in *Ex parte L.*—a decision which Mr. Fawcett has subjected, in this *Year Book,*[1] to some penetrating criticism—was given, in effect, after the war, but it still had some, though not quite obvious, bearing on a situation which arose during the war. This cannot be said of the judgment in *Loewenthal and Others* v. *Attorney-General*, [1948] 1 All E.R. 295, lucidly analysed amidst some adverse but fully persuasive criticism by Mr. Evans in the present issue of the *Year Book.*[2] The effect of that decision was to make it impossible for the plaintiffs, whom the court held to be enemy nationals notwithstanding their denationalization by a German decree of 1941, to proceed with an application under Section 18 of the Patents and Designs Acts, 1907–46, for an order extending patents of which they were the owners. It seems highly desirable that English courts should avail themselves of the suggestion contained in Judge McNair's brief intimation that the rigid refusal to recognize foreign enemy denationalization decrees might be limited to the period of the war. There is something embarrassing in a decision the result of which is to take away, after the war and for purposes entirely unconnected with its conduct and with the safety of the realm, the property of the victims of a cruel persecution at the hands of the defeated enemy. The notion of public policy is here stretched to a point where it becomes totally divorced from its ordinary connotation.

[1] Vol. 23 (1946), p. 379.

[2] See above, p. 425.

The new edition includes two new and instructive chapters, appearing in the Appendix, on 'The Law Reform (Frustrated Contracts) Act, 1943' and on 'The Requisitioning of Merchant Ships'.

H. LAUTERPACHT

Vertragsabschluss, Vertragsgültigkeit und Parteiwille im Internationalen Obligationenrecht. By Dr. RUDOLF MOSER. St. Gallen: Verlag der Fehr'schen Buchhandlung. 1948. xviii+253 pp. 22.50 fr.

Swiss private international law, adopting a somewhat isolated attitude (see Rabel, *The Conflict of Laws*, vol. ii, pp. 396, 520), distinguishes, in matters relating to contracts, between two phases. The conclusion of the contract is governed by the *lex loci contractus*, while its validity and interpretation are determined by the proper law. Dr. Moser examines whether, and if so to what extent, this *dépéçage* is justified. In the first chapter he studies successively the attitude of courts and writers in Switzerland, Germany, France, Italy, and England, adding, in outline, a survey of the practice of a great many other countries. A detailed examination of Swiss case law shows that the present practice of Swiss courts was only established, after much wavering, in the course of the present century. As regards all other countries Dr. Moser, relying chiefly on secondary and not always complete information (especially as regards England and the United States), confirms the current impression that a *dépéçage* in the sense of the Swiss practice is unknown elsewhere and that the question whether a contract has been concluded is usually decided by the law which would govern the contract if it were validly concluded.

On the basis of this divergence between the Swiss view and the prevailing opinion elsewhere, the author examines the question as to what provisions of Swiss law must be regarded as referring to the conclusion, as distinct from the validity, of the contract, and to what extent these provisions are mandatory (*jus cogens*) or directory (*jus dispositivum*). The results, which are somewhat inconclusive, lead him to the proposition that there is no difference, in principle, between rules relating to the conclusion and the essential validity and interpretation of contracts. The objection that free choice by the parties as to the law which is to govern the contract, if validly concluded, is inoperative if the contract is invalid by its proper law, is met by an argument not unlike that employed in *Heyman* v. *Darwins Ltd.*, [1942] A.C. 356, in respect of arbitration clauses to the effect that the agreement as to the law governing the contract exists independently of the contract itself and survives even if the contract is invalid for intrinsic reasons. It would seem, however, that this solution may require further consideration, especially where duress and lack of *consensus ad idem* are concerned. On the other hand, he admits that it is possible to find some substance in the question to what extent mandatory rules can influence free choice of law in respect of contracts as a whole. Thus the question as seen by Swiss courts is found to be part of a wider problem, also known and discussed in England and other countries, to what extent the mandatory rules of the *lex loci contractus* must prevail over the free choice of law exercised by the parties. Unfortunately, the author fails to notice such cases as *The Torni*, [1932] P. 27 and *Vita Food Products Inc.* v. *Unus Shipping Co.*, [1939] A.C. 277 which raised the same question. However, proceeding from theoretical considerations, he finds that free choice of law expressed in a contract is effective, provided the conflict rules of the *forum* sanction free choice, and that it is irrelevant whether the domestic law of the *forum* or of the *lex loci contractus* would regard a reference to foreign law as void on the ground that their own mandatory rules of private law are evaded. Freedom of choice in domestic law and in the conflict of laws lie on different planes.

This neat conclusion, which deserves approval, disposes of the current difficulty how to reconcile free choice of law with the existence of mandatory rules of domestic law. According to the author such rules are only relevant if they are part of the legal system chosen by the parties. The objection that the mandatory rules of the *leges fori* and *loci contractus* are thus disregarded are conclusively met by the argument that the *lex fori* can always express itself through the principle of public policy while the *lex loci contractus* cannot lay claim to preferential observance (unless the conflict rules of the *forum* so provide expressly). Moreover, the choice of the place of contracting is to a certain extent an arbitrary choice by the parties. The only difference between the free choice of the place of contracting and free choice of a legal system is that the former is an indirect choice of law, more arbitrary and haphazard than the latter and less influenced by legal considerations. Regarding the limits of free choice, the author declares himself in favour of full liberty, provided the contract contains a foreign element, a result which to the author follows naturally from the fact that only the law chosen by the parties should determine the limits of the freedom to contract. To use this argument would mean, however, a relapse into an argument drawn from domestic law. The question whether unbridled free choice by the parties is to be accepted is a matter of policy to be determined by the rules of the conflict of laws of every individual *lex fori*. The author supports his own view by an historical survey, beginning with the past glossators and ending with modern writers, of the views which have been put forward how to determine the law which governs a contract. To a lesser extent he studies also the practice of states. This survey, which is rather cursory and draws much upon other writers, does not add much to the book but it assists the author's arguments. On the other hand, the considerable mass of material bearing upon the influence of other factors which contribute to a *dépéçage* of a contract in private international law, such as the influence of the *lex loci solutionis*, are passed over too rapidly. The value of the work lies in its theoretical considerations and its handling of Swiss case law rather than in its comparative treatment of the history and current practice relating to the problems under review. Its function is principally iconoclastic, for it disposes finally of the view, held primarily in Switzerland, that the various phases of a contract are necessarily or preferably governed by different systems of law. It delivers a strong blow at the theories which advocate that mandatory rules of legal systems other than that of the proper law can influence a contract. On the positive side it provides persuasive theoretical arguments in favour of free choice of law by the parties. The book would have benefited from some careful pruning and rearrangement, but this does not seriously affect its merit as a thorough study in a particularly disputed sphere of private international law.

K. LIPSTEIN

Einwirkung des Krieges auf die nichtpolitischen Staatsverträge. By RICHARD RÄNK. Uppsala. 1949. 234 pp. 10 kroner.

In recent years numerous multilateral treaties have been concluded which are concerned not with the political interests of individual states but, as Dr. Ränk expresses it, with the international legal order in general. Prominent amongst these are treaties for the protection of the private law interests of individuals, and treaties designed to facilitate international transport and communications. Dr. Ränk's book deals with the effect of war on treaties of this nature. He believes that their operation need not be restricted to times of peace, as their provisions have no influence on the power or on the existence of states. In a fully documented study he shows that states have tended to admit that 'non-political, multilateral' treaties survive a war between two or more signatories.

In the first part of the book the author discusses the effect of war on treaties in general. Referring to the writings of leading authorities on international law, to decisions of national and international tribunals, and to the practice of states as manifested in official pronouncements and in treaty provisions, he finds that at the present day the theory of the general destruction of legal obligations by war is not accepted. States distinguish between different categories of treaties, some by reference to an objective standard, some by reference to the implied intention of the parties. Dr. Ränk then brings evidence to show that 'multilateral, non-political treaties' are generally regarded as the most likely category of treaties to survive a war.

In the second part Dr. Ränk discusses in detail treaties which safeguard the personal or property rights of individuals and those which regulate international transport and communications. He finds that states have not considered that these treaties lapse on the outbreak of war. But he shows that the operation of treaties dealing with the rights of individuals has often been suspended between belligerents, particularly under the influence of the Anglo-American doctrine that war affects not only states but individuals. Similarly, he points out that the work of international commissions set up under the provisions of treaties on transport and communications, though rarely completely suspended, has been made very difficult by world-wide conflagrations.

This is hardly a book for the average student, for it is far too detailed. But the specialist will find it a mine of valuable information.

F. M.

L'O.N.U. et la Paix. Le Conseil de Sécurité et le Règlement Pacifique des Différends. By A. Salomon. Paris: Les Editions Internationales. 1948. 204 pp. 500 fr.

It is perhaps too early to discuss the Charter of the United Nations in the light of practice. The writer on the subject must base his arguments mainly on the text. As the text of Chapter VI of the Charter has already been examined by various authors, this study contributes little that is entirely novel. But within the space of a comparatively short book M. Salomon provides an exhaustive and lucid discussion of all the points in Chapter VI which have given rise to controversy. He deals with the competence of the Council *ratione materiae* and *ratione personae*, and the field exempted from its jurisdiction (Chapter II); with the methods of action of the Council and their legal effect, with particular reference to the difference between disputes and situations (Chapter III); with the manner in which disputes and situations are brought to the notice of the Council (Chapter IV); with the voting formula (Chapter V); and with the Council's rules of procedure (Chapter VI).

Two features of the Charter strike M. Salomon particularly. The first is its preoccupation with peace and security, and the absence of a corresponding emphasis on law and justice. The writer shows that the Dumbarton Oaks project contained no reference to law and justice. Owing to the insistence of the smaller nations these terms were included in the final draft of the Charter, but were not accorded the importance due to them. This fact has important repercussions on the application of Chapter VI of the Charter. Thus the competence of the Council is limited to disputes 'likely to endanger international peace and security'. The Council is not able to mediate in, or to press for the settlement of, every dispute. This definition of the Council's competence also blurs the distinction between pacific settlement and enforcement action, to be taken when there is a 'threat to the peace'. In this connexion the writer points out that the Russian text of Article 37 (2) contains a reference to action by the Council under Article 39, an article dealing with sanctions, while the other four texts refer to Article 36, which deals with pacific settlement of disputes. The Russian text is more logical, but preparatory work shows that the other texts reflect the intention of the authors more correctly. Secondly, the Council is free to choose any method of action. Although it is in Article 36 (3) of the Charter asked to take into consideration the possibility of submitting 'legal disputes' to the International Court of Justice, it is under no obligation to do so. Thirdly, by virtue of Articles 53 and 107 ex-enemy states have no remedy under Chapter VI against action taken under these articles.

The other outstanding feature is the predominant position reserved to the Great Powers. This is particularly evident in the voting formula, dealt with in Chapter V of M. Salomon's work. In his view the exceptions to the 'veto' provided for in Article 27 (3) of the Charter are meaningless. For he assumes—a matter exhaustively discussed in Chapter III—that the Security Council must, before taking any action, decide whether, first, the matter is one affecting international peace and security, and, secondly, whether it is a dispute or a situation. On both these preliminary decisions the permanent member directly involved is able to exercise his vote.

It is possible that the practice of the Security Council will invalidate some of M. Salomon's conclusions, which are based, as he admits at the outset, mainly on a textual criticism of the Charter. It is significant that where M. Salomon refers to incidents brought before the Council, the action taken by the latter contradicts his conclusions. Thus M. Salomon considers that the exemption of 'matters of domestic jurisdiction' from the purview of the Council is more far-reaching than under the Covenant of the League of Nations. For although the term 'essentially' used in Article 2 (7) of the Charter is wider than the term 'solely', there is no reference to the standard of international law, and the parties, not the Council, are to judge whether a matter is within their domestic jurisdiction. But he admits that the practice of the Council has cast doubt on his third point, and that the Council has interpreted its jurisdiction extensively. Again, with regard to investigation by the Council under Article 34, he holds that its power of examination is limited to discovering whether a dispute is a danger to international peace and security. But he admits that the Council has not stultified itself in that way. In Chapter V he admits that the practice of the Council has evolved a rule whereby the abstention of a permanent member from voting is not tantamount to a negative vote, as might be inferred from Article 27 of the Charter. In fact, the Council is a living organism capable of overcoming some of the difficulties arising from the inadequate drafting of the Charter. Subject to these reservations, M. Salomon's book remains a valuable study of the various aspects of pacific settlement of disputes under the Charter of the United Nations.

F. M.

A Manual of International Law. By GEORG SCHWARZENBERGER, Ph.D., Dr.Jur. London: Stevens & Sons, Ltd. Published under the auspices of the London Institute of World Affairs. l+428 pp.

To the reviewer this work presents something of a problem. He must be in some doubt as to whether he should confine his comments to the text before him or whether he may properly enlarge his terms of reference so as to include the learned author's interesting article entitled 'The Inductive Approach to International Law', which appeared in the *Harvard Law Review* in 1947 and which is referred to in the Preface to this work as containing 'a fuller exposition of the reasons why, in this Manual, the inductive method is being used'. Dr. Schwarzenberger has, indeed, written a good deal, in a good many different places, about the inductive method. This constant returning to the same theme is rather surprising. For there is nothing new about the method. Its advantages and its limitations were well explored before this. And, to quote from the article mentioned, 'bulk is no substitute for new principles'. Moreover, there is surely much to be said for the thesis that 'Men should be taught as though you taught them not', and for the avoidance of technical disquisitions on method in an elementary manual.

The actual text of this work is of no great bulk. It consists in an essay in seventy-five pages on the Law of Peace, to which are appended a chapter on War and Neutrality, one on international institutions, and, finally, one of a somewhat speculative character entitled 'Patterns of International Law and Organisation in the Atomic Age'. More than half the book is made up of Study Outlines, following the arrangement of the text and containing a great number of questions for students, together with profuse references to sources from which the answers can be obtained. Many, if not most, of the questions are of a highly difficult character. But it is not intended that the beginner should read all the material recommended, nor that he should necessarily work through the whole of the Study Outlines. Even if he should have time to think over the questions alone, this should, the learned author contends, prove helpful. And this must indeed be so—though the present writer is forced to admit that his reaction to such a question as 'Compare the status in English law of the Allied Forces in Great Britain during the First and Second World Wars with the position of such forces under international customary law' (p. 211) is one of mere fright. Incidentally, this is but a third part of one of the twelve questions set on a chapter entitled 'State Jurisdiction' which occupies only nine pages of text and which does not appear to say anything about the status of military units in foreign territory except that their immunity from jurisdiction is to be explained by the same reasons which apply in the case of diplomatic representatives. And it may further be remarked that the three pages of references to sources of information provided to enable the question to be answered do not appear to contain any specific reference to information concerning the status of foreign forces in Great Britain during the War of 1914–18.

An interesting feature of Dr. Schwarzenberger's book is its 'Glossary of Terms and Maxims'. This should be very useful to the student: an International Law Dictionary in the English language is much needed. In connexion with the Glossary, as well as with the Study Outlines, the learned author invites suggestions for improvement from the reader. It is impossible to quarrel with most of the definitions given, especially in view of Dr. Schwarzenberger's declaration that it is not his purpose to make these exhaustive, but rather to provide prima facie information on terms and maxims which are likely to cause difficulties for the beginner. But may it be suggested that to confine the meaning of 'submission'—in connexion with jurisdiction—to that of a 'proposition submitted by a party to a court for approval' is slightly misleading?

CLIVE PARRY

Deutschlands Rechtslage. By ROLF STÖDTER. Hamburg: Rechts- und staatswissenschaftlicher Verlag GmbH. 1948. 291 pp.

Deutschlands Rechtslage unter der Besatzung. By ERICH KAUFMANN. Stuttgart: K. F. Koehler Verlag. 1948. 84 pp.

Ein Besatzungsstatut für Deutschland. Die Rechtsformen der Besatzung. By WILHELM GREWE. Stuttgart: K. F. Koehler Verlag. 1948. 233 pp.

These three books are substantially concerned with the same questions: Is Germany still a state in international law? Does a state of war subsist between Germany and the Allied Powers? Is the occupation of Germany an *occupatio bellica* governed by the rules of the Fourth Hague Convention of 1907? If not, what is the legal basis of the occupation? And, arising from the last point, are the acts of the occupation forces with regard to denazification and demilitarization legal?

Mr. Stödter's views are conservative. Germany is still a state. Her subjugation could only be effected by virtue of annexation, and that has not taken place. A state of war continues to exist, as the war has not been ended by any of the methods sanctioned by customary international law. The 'unconditional surrender' of German forces was a military capitulation which has in fact ended Germany's ability to resist, but has not changed the legal position. The occupation of Germany is, then, an ordinary *occupatio bellica* governed by the rules of the Fourth Hague Convention. The writer emphatically rejects the suggestion that concepts such as 'trusteeship' can be used to describe the relationship between the occupying Powers and Germany. He argues, with some cogency, that it is doubtful whether trusts, in the technical sense, are known to international law; that the present government of Germany shows none of the features usually associated with trusts; and that the description of the present régime in Germany as a trust leaves unanswered the question whether the Allies had a right in international law to create such a relationship. In considering the policy of the occupying powers he then puts forward the view that Article 43 of the Hague Rules permits interference with the local law for the achievement of the 'purposes of war' of the occupying power. As the denazification and demilitarization of Germany was one of the major war aims of the Allies, it can be undertaken during a military occupation. At first sight it seems difficult to reconcile this view with the injunction, in Article 43, to respect the local law 'unless absolutely prevented'. But Mr. Stödter supports his view with a wealth of evidence. On the whole this book is soundly argued—although in the early chapters excessive space is spent on a detailed criticism of the very considerable literature on the legal position of Germany.

In contrast, Professor Kaufmann's discussion of the legal aspect of the subject is brief. He agrees that Germany is still a state, as the *animus* for annexation is lacking. He also agrees that the war has not been ended. But he believes the Hague Rules to be inapplicable to the occupation of Germany on the ground that they assume the continuance of military operations. Instead he regards the authority of the occupation powers as a kind of trusteeship similar to United Nations Trusteeships and also to the rule of the United States in Cuba after 1898. The present régime in Germany is based on no agreement. The question arises whether the authority to act as trustee can be derived from international law in general. Professor Kaufmann does not stop to discuss such questions. Instead, he devotes more than half of his short book to a criticism of the acts of the occupying authorities in the light of the concept of 'trusteeship'.

Inevitably his view of the true interest of Germany, the beneficiary of the 'trust', is subjective.

Professor Grewe also assumes that a departure from traditional rules is required in the case of Germany. The aim of his book is to elaborate an occupation statute, to be based on agreement with Germany, which will define in detail the régime which now exists only in outline. But in pursuing this practical aim he gives us, in Part I of his book, an exhaustive and stimulating discussion of the legal problems involved. He, too, holds that Germany still exists as a state. In this connexion he doubts whether annexation is now possible without the agreement of the conquered population by means of a plebiscite. The war, he proceeds, still continues, but hostilities have ceased, and the occupation is therefore not *occupatio bellica*, but a 'military security occupation'. Only those provisions of the Hague Rules apply to it which could refer to any kind of occupation, such as those safeguarding the life and honour of the population. But the military aspect of Allied authority does not exhaust the complexities of the present status of Germany. By virtue of their conquest the Allies exercise the German powers of government. Professor Grewe then advances an interesting theory regarding the grounds of this 'sequestration' of German authority. Sequestration is known to the public law of federal states as a method of execution against recalcitrant members. As the international community is becoming more homogeneous, it is possible that it may accept the concept of political intervention, followed by sequestration, to ensure the acceptance of certain standards by all states. The conduct of war by the Allies can be regarded as intervention seeing that one of their main aims was the denazification and demilitarization of Germany. They now exercise the government of Germany with the purpose of fulfilling this aim in the spirit of trusteeship. In a short second part Professor Grewe then elaborates the practical application of his theories. In an Appendix there is a brief critical discussion of the London Conference on the Government of Western Germany.

It is clear that in Germany, as in this country, there is no agreement on the legal status of Germany at the present moment. The lawyer interested in the problem will be stimulated by its discussion in these studies by German writers.

F. M.

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BIBL. LONDIN. UNIV.

PRINTED IN
GREAT BRITAIN
AT THE
UNIVERSITY PRESS
OXFORD
BY
CHARLES BATEY
PRINTER
TO THE
UNIVERSITY

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